Supreme Court, U.S
FILED

No. 03 577 OCT 13 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

HAROLD FRANK AND FOREST COUNTY POTAWATOMI COMMUNITY OF WISCONSIN,

Petitioners,

v.

FOREST COUNTY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT H. FRIEBERT
Counsel of Record
MATTHEW W. O'NEILL
FRIEBERT, FINERTY & ST. JOHN, S.C.
Two Plaza East – Suite 1250
330 East Kilbourn Avenue
Milwaukee, Wisconsin 53202
(414) 272-0130

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

F/0

QUESTIONS PRESENTED

A reapportionment plan that deviates by 10% from the goal of equality is presumptively unconstitutional under the one person, one vote rule, and must be justified by the government. Petitioners challenged the 2001 Forest County reapportionment plan, which has an 18% deviation. The Seventh Circuit rejected this Court's 10% Rule as "absurd" when applied to small jurisdictions, and held that an excessive deviation is subject only to a "rational basis" level of scrutiny. Petitioners also challenged the plan under the Voting Rights Act, alleging that Native Americans were illegally split among the districts. This claim was dismissed under *Thornburg v. Gingles*, 478 U.S. 30 (1986) because the voting age population of Native Americans, as opposed to their total population, was not "sufficiently large" to "constitute a majority" in a differently drawn plan.

Accordingly, the questions presented for review are:

1. Whether the 10% Rule of *Brown v. Thompson*, 462 U.S. 835 (1983) applies to all jurisdictions, regardless of size.

2. Whether a presumptively unconstitutional reapportionment plan implicating the fundamental right to vote is subject only to a "rational basis" level of judicial scrutiny.

3. Whether voting age population, total population or some other measure must be used in analyzing a Voting Rights Act claim, or whether the relevant population base is a political choice for the redistricting body.

LIST OF PARTIES

HAROLD FRANK and FOREST COUNTY POTAWATOMI COMMUNITY OF WISCONSIN are the Petitioners.

FOREST COUNTY, a Municipal corporation, FOREST COUNTY BOARD OF SUPERVISORS, and ELIZABETH ISON, in her Official Capacity, are the Respondents.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
A. The Seventh Circuit's Holding that the 10% Rule of *Brown v. Thompson*, 462 U.S. 835 (1983) Does Not Apply to Small Jurisdictions Directly Conflicts With this Court's Precedents, Warranting Certiorari and Summary Reversal	5
B. A Government Required to Justify a Presumptively Unconstitutional Plan Must Do More Than Identify a *Post Hoc* "Rational Basis" for the Excessive Deviation	7
C. Petitioners' Voting Rights Act Claim Turns on the Unanswered Question of Whether Voting Age Population, Total Population or Some Other Measure Applies to Claims Under the Voting Rights Act, or Whether the Appropriate Population Base is a Political Decision Left to the Government	10
CONCLUSION	14

TABLE OF CONTENTS – Continued

Page

APPENDIX:

Harold Frank and Forest County Potawatomi Community v. Forest County, et al., 336 F.3d 570 (7th Cir. 2003) ..... App. 1

Order Denying Rule 59(e) Motion for Reconsideration of Judgment on Plaintiff's Equal Protection Claim ..... App. 11

Harold Frank and Forest County Potawatomi Community v. Forest County, the Forest County Board of Supervisors, and Elizabeth Ison, in her Official Capacity, 194 F.Supp.2d 867 (E.D. Wis. 2002) ..... App. 12

TABLE OF AUTHORITIES

Page

CASES

Avery v. Midland County, 390 U.S. 474 (1968) 6, 7

Barnett v. City of Chicago, 141 F.3d 699 (7th Cir. 1998), *cert. denied*, 524 U.S. 954 (1998) 11

Brown v. Thompson, 462 U.S. 835 (1983) 5, 6, 7

Burns v. Richardson, 384 U.S. 73 (1966) 12

Chapman v. Meier, 420 U.S. 1 (1975) 6, 7, 8

Chen v. City of Houston, 532 U.S. 1046 (2001).....11

Dunn v. Blumstein, 405 U.S. 330 (1972) 8

Evans v. Cornman, 398 U.S. 419 (1970)..... 8

Georgia v. Ashcroft, 539 U.S. ___, 156 L. Ed. 2d 428 (2003).....12, 13, 14

Johnson v. DeGrandy, 512 U.S. 997 (1994).....11

Karcher v. Daggett, 462 U.S. 725 (1983)..... 8

Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985).....11

Mahan v. Howell, 410 U.S. 315 (1973) 6, 8

Reynolds v. Sims, 377 U.S. 533 (1964) 8

Thornburg v. Gingles, 478 U.S. 30 (1986) 11, 14

CONSTITUTIONAL PROVISION

Fourteenth Amendment to the United States Constitution 1

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254 1

28 U.S.C. § 1331 3

42 U.S.C. § 1973 ..... 2, 3, 13

42 U.S.C. § 1983 3

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 336 F.3d 570 (7th Cir. 2003). *Pet. App.* 1-10. The district court's opinion granting respondents' summary judgment motion is reported at 194 F. Supp. 2d 867 (E.D. Wis. 2002). *Pet. App.* 12-49. The district court's opinion denying petitioners' motion for reconsideration is unpublished. *Pet. App.* 11.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on July 15, 2003. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

Section 2 of the Voting Rights Act of 1965 (as amended), 42 U.S.C. § 1973:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973(b)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members

of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

This case involves core questions about the one-person, one-vote principle of the Equal Protection Clause, and the manner in which Voting Rights claims by minorities are adjudicated. In the Equal Protection context, this case presents the question of whether this Court's existing constitutional standards only apply to "large" jurisdictions and whether the government can justify a presumptively unconstitutional plan by simply identifying a *post hoc* "rational basis" for an excessive deviation from equality. In the Voting Rights context, this case presents a question the Court has expressly left open – whether total population, voting age population or some other measure should be used to determine whether a reapportionment plan has a prejudicial impact on minorities, or whether that is a political choice left to the redistricting body.

The jurisdiction of the district court was invoked under 42 U.S.C. § 1983 and 28 U.S.C. § 1331, with Petitioners alleging violations of the Voting Rights Act, 42 U.S.C. § 1973, and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. *Pet. App.* 14.

Forest County is a relatively small county in northeastern Wisconsin, with 10,024 residents identified in the 2000 census. In the wake of the census, Forest County engaged in redistricting of its 21-member county supervisory board.

The 2000 census figures demonstrated that the Native American population in Forest County had grown by over 50% in the decade, rising from 8.4% of the county population in 1991 to 11.7% in 2000. Overall, Native Americans were responsible for 32% of the County's total growth in the decade.

The 1991 Forest County plan included only one majority Native American district. Based upon their population growth, Petitioners requested that the County create two additional districts with a majority of Native Americans, including a district in the Town of Wabeno where a portion of the Potatwatomi Reservation is located. Petitioners submitted a proposed plan creating a district in Wabeno with a majority of Native Americans using total population figures, the only figures used by Forest County. Using voting age population, however, Native Americans were a minority in the proposed district. The County rejected Petitioners' request, and approved a plan that divided the Native Americans in the Wabeno area among three separate districts.

The 2001 Forest County Plan deviated significantly from the ideal of equal representation. With 21 supervisory districts and 10,024 people, the "ideal" district size is 477 people. The county's plan included one district of 514 people and another with 428, creating a maximum deviation of 18.03%.

The only substantive evidence presented regarding the County's actual reasoning in adopting a plan with an 18% maximum deviation was a statement by the plan drafter that the "ideal" was 10% and he tried to stay within 20%:

> Andy Faust [of the North Central Wisconsin Regional Planning Commission] pointed out the 18% total swing in the current plan, and that the districts are small in population, so he tried to stay within 20%; although the ideal is 10%, the court has upheld up to 30% deviation.

Forest County submitted the testimony of an expert witness, who was not involved in preparing the plan, that the 18% deviation in the 2001 County Plan was "explainable" in terms of not further splitting township lines, not decreasing the Native American makeup in one district, and maintaining the contiguity of emergency and school districts. Petitioners demonstrated at trial that with only three adjustments, the maximum deviation could be lowered to approximately 10%. The Seventh Circuit found that "[t]here are an unbelievably vast number of district configurations that would result in districts in Forest County of equal population." *Pet. App.* 6.

REASONS FOR GRANTING THE WRIT

A. The Seventh Circuit's Holding that the 10% Rule of *Brown v. Thompson*, 462 U.S. 835 (1983) Does Not Apply to Small Jurisdictions Directly Conflicts With this Court's Precedents, Warranting Certiorari and Summary Reversal

This Court has established a benchmark of 10% as the generally accepted maximum deviation from the ideal of one-person, one-vote. If a plan has a deviation of less than 10% it is presumptively constitutional. Conversely, if the maximum deviation exceeds 10% the plan is presumptively unconstitutional, and the burden shifts to the defendant to show that the excessive deviation was approved in good

faith and was based upon legitimate and rational state objectives. *Brown v. Thompson*, 462 U.S. 835, 842-43 (1983); *Mahan v. Howell*, 410 U.S. 315, 324-25 (1973).

The 2001 Forest County Plan, with a deviation exceeding 18%, is presumptively unconstitutional under this rule. While acknowledging this Court's precedent, the Seventh Circuit discarded it as "arbitrary" and "absurd" when applied to small electoral units such as Forest County: "The smaller and more scattered the population of the area to be redistricted and the more numerous the districts, . . . the more arbitrary the rule of 10% prima facie liability becomes, until finally it becomes absurd." *Pet. App.* 4.

This decision directly conflicts with prior decisions of the Court establishing that the one-person, one-vote principle applies equally to all local governments involved in redistricting, *see Avery v. Midland County*, 390 U.S. 474, 484-85 (1968) ("[T]he Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body."), and that the smaller and less populated the district subject to reapportionment, the greater the need for equality. In *Chapman v. Meier*, 420 U.S. 1 (1975), the Court expressly rejected arguments that a 20% deviation was appropriate because the State was "sparsely populated." The Court stressed that not only was a sparse population *not* a legitimate basis for a substantial deviation from equality, but that the smaller the population, the more important the goal of equality becomes:

> [S]parse population is not a legitimate basis for a departure from the goal of equality. A State with a sparse population may face problems different

> from those faced by one with a concentrated population but that, without more, does not permit a substantial deviation from the average. Indeed, in a State with a small population, each individual vote may be more important to the result of an election than in a highly populated State. Thus, particular emphasis should be placed on establishing districts with as exact population equality as possible.

Id., 420 U.S. at 24-25. *See also Avery*, 390 U.S. at 480 ("[W]hen the State delegates lawmaking power to local government and provides for the election of local officials from districts specified by statute, ordinance or charter, it must insure that those qualified to vote have the right to an equally effective voice in the election process.").

The Seventh Circuit's outright rejection of the 10% Rule based on the size of Forest County, and its suggestion that sparsely populated jurisdictions have greater leeway to depart from the goal of equal representation, *Pet. App.* 4-5, are in direct conflict with these decisions, warranting the issuance of a writ of certiorari and summary reversal under Supreme Court Rule 16.1 to reaffirm that the fundamental principle of one-person, one-vote and the 10% Rule of *Brown v. Thompson* apply to all governments engaged in redistricting, regardless of size.

B. A Government Required to Justify a Presumptively Unconstitutional Plan Must Do More Than Identify a *Post Hoc* "Rational Basis" for the Excessive Deviation

This Court has held that "the Equal Protection Clause requires that a State make an honest and good faith effort" to create districts "as nearly of equal population as

is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). When excessive deviations from the "equal-population principle" are challenged, the government must demonstrate that the deviations "***are based on*** legitimate considerations incident to the effectuation of a rational state policy." *Id.* at 579 (emphasis supplied). *See also Chapman*, 420 U.S. at 24 (rejecting proposed rational bases for an excessive deviation because "none of them have been explicitly shown to necessitate the substantial population deviation embraced by the plan."). This is consistent with the "close constitutional scrutiny" generally applied to laws restricting or limiting the right to vote. *See, e.g., Evans v. Cornman*, 398 U.S. 419, 422 (1970) ("before [the right to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny."); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (Equal Protection challenges to voting qualifications subject to close constitutional scrutiny).

In the analogous context of Article I, Section 2 of the Constitution, the Court held that a State must demonstrate "that the population deviations in its plan ***were necessary*** to achieve some legitimate state objective." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (emphasis supplied). "The State must . . . show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions." *Id.* at 741. While "more flexibility [is] constitutionally permissible with respect to state [or local] legislative reapportionment than in congressional redistricting," *Mahan*, 410 U.S. at 321, allowing the use of *post hoc* rational basis review threatens to undermine entirely the

requirement of a "good faith effort" to achieve equal representation.

Forest County made no showing that the 18% deviation was "necessary" to achieve legitimate state objectives, or that the County made a "good faith effort" to achieve equality. All the underlying record established is that the County believed that 10% was the "ideal," and that its goal was to stay within 20%. The balance of the justification was *post hoc*, consisting of expert testimony explaining how the plan could be interpreted as advancing legitimate objectives such as honoring town boundaries and existing school districts.

The Seventh Circuit acknowledged the lack of evidence concerning the County's actual reasons for approving a plan with an 18% deviation, but held, without discussion (by emphasizing a word in its opinion), that it is sufficient to merely identify a *post hoc* rational basis for an excessive deviation:

> All this said, the board didn't provide much in the way of an explanation for the particular districting choices it made out of the almost infinite array theoretically available. (There are an unbelievably vast number of district configurations that would result in districts in Forest County of equal population.) But as with most other cases in which governmental action is challenged is a violation of a federal constitution, it should be enough that good reasons *can* be given for the action, whether or not they were articulated in advance of the action.

Pet. App. 6 (emphasis in original). Once again the Seventh Circuit justified its analysis by deriding the size of Forest County and the duties of its elected representatives:

> This precept is especially appropriate when one is dealing with so tiny a polity as Forest County, Wisconsin. We intend no disrespect in saying that the exceedingly modest functions that the State of Wisconsin has assigned to the board of supervisors of this remote rural county preclude any reasonable expectation of a deliberative process that we might expect of the Congress of the United States on one of its better days.

Pet. App. 7.

Finally, the Seventh Circuit noted that it was "reluctant" to "burden" the County with the "expenses" of additional redistricting that it viewed as "disproportionate to either its resources or its responsibilities." *Id.*

Certiorari should be granted to answer the important federal question of whether a presumptively unconstitutional redistricting plan is subject to a rational basis review or the close constitutional scrutiny ordinarily associated with equal protection challenges based upon the fundamental right to vote.

C. Petitioners' Voting Rights Act Claim Turns on the Unanswered Question of Whether Voting Age Population, Total Population or Some Other Measure Applies to Claims Under the Voting Rights Act, or Whether the Appropriate Population Base is a Political Decision Left to the Government

Among the myriad issues presented in redistricting litigation, one central question remains largely unanswered – whether total population, voting age population, citizen voting age population or some other measure is the proper baseline upon which to measure a plaintiff's

claims. This issue remains undecided both in the context of the Voting Rights Act, *see Johnson v. DeGrandy*, 512 U.S. 997, 1017 n.14 (1994) (it is unresolved "whether the relevant figure [in a Voting Rights Act claim] is the minority group's share of the population, or of some subset of the population, such as those who are eligible to vote"), and the one-person, one-vote principle of Equal Protection. *See Chen v. City of Houston*, 532 U.S. 1046 (2001) (Thomas, J., dissenting from denial of certiorari) ("We have never determined the relevant 'population' that States and localities must equally distribute among their districts.").

In the Voting Rights context, the question is presented in sharp relief on this record. Native Americans constitute a majority (51.5%) of the proposed alternative district if total population is the appropriate measure, but a minority (42.4%) if voting age population is the appropriate measure. This issue was determinative of Petitioners' Voting Rights Act claim. The district court, applying Seventh Circuit precedent requiring the use of citizen voting age population figures, held that Petitioners' plan did not meet the first *Gingles* factor, which requires a minority population "sufficiently large to constitute a majority in the proposed district." *Pet. App.* 34. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).[1]

---

[1] In light of controlling Seventh Circuit precedent requiring the use of citizen voting age population, *see Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985), and *Barnett v. City of Chicago*, 141 F.3d 699, 702 (7th Cir. 1998), *cert. denied*, 524 U.S. 954 (1998), Petitioners did not actively pursue this issue in the Seventh Circuit, but specifically preserved the right to seek review of the issue in this Court.

In *Burns v. Richardson*, 384 U.S. 73 (1966), the Court suggested that the choice of what population base to use for redistricting is essentially a political choice. "[T]he decision to include or exclude" various groups "in the apportionment base . . . involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere." *Id.* at 92. Here, Forest County relied only upon total population figures in completing its redistricting. *Pet. App.* 15. Petitioners believe this decision should establish the baseline for all constitutional challenges to Forest County's reapportionment. If the County, for its own political reasons, determines that ***all*** of its inhabitants, regardless of age or citizenship, are entitled to equal representation and constructs its plans using total population as the base, all of the County's inhabitants should likewise be entitled to an equal opportunity to participate in the political process. In short, while the government can choose who to include and not include in its redistricting calculus, that political choice should control any Equal Protection and Voting Rights Act challenges to the plan.

Rejection of a categorical proclamation that one or the other measure must be applied to a Voting Rights Act claim is further suggested by the Court's evolving recognition that a government involved in redistricting may make a legitimate "political choice" to utilize "influence districts" as a means of safeguarding the rights of minorities to participate in the political process. In *Georgia v. Ashcroft*, 539 U.S.___, 156 L. Ed. 2d 428, 452 (2003), a § 5 preclearance action, the Court held that where courts must consider "the extent of the minority group's opportunity to participate in the political process," it was error not to consider the potential impact of "influence districts."

> [A] court must examine whether a new plan adds or subtracts "influence districts" – where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process.

Id., 156 L. Ed. 2d at 453. The Court held that the decision of whether to focus on majority-minority districts with a clear ability to elect minority representatives or on influence districts where minorities may achieve greater overall substantive representation is a political choice:

> [T]he State's choice ultimately may rest on a political choice of whether substantive or descriptive representation is preferable. . . . The State may choose, consistent with § 5, that it is better to risk having fewer minority representatives in order to achieve greater overall representation sympathetic to the interests of minority voters.

Id.

The same analysis should apply in the § 2 context, where one of the central statutory questions is whether a minority's ability "to participate in the electoral process" has been compromised by the reapportionment. 42 U.S.C. § 1973(2)(b). Forest County chose to rely solely on total population figures in its redistricting efforts. The Native American Petitioners likewise proposed a district in which they would represent a majority of the total population, although not a voting age majority. At a minimum the proposed district would create an influence district, with a 42.4% share of the voting age population and 51.5% of the total population (compared with 33.9% voting age and 42.4% total population in the current plan). In light of the fact that "various studies have suggested that the most effective way to maximize minority voting strength may be

to create more influence or coalition districts," *Georgia v. Ashcroft*, 156 L. Ed. 2d at 453, Petitioners should be allowed to pursue their claim of vote dilution where, using the population base chosen by the redistricting body, Native Americans are "sufficiently large to constitute a majority in the proposed district." *Gingles*, 478 U.S. at 50-51.

Certiorari should be granted to answer the important federal question of whether the Voting Rights Act requires the use of a specific population base, or whether the appropriate population base is a political choice left to the redistricting entity.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT H. FRIEBERT
Counsel of Record
MATTHEW W. O'NEILL
FRIEBERT, FINERTY & ST. JOHN, S.C.
Two Plaza East – Suite 1250
330 East Kilbourn Avenue
Milwaukee, Wisconsin 53202
(414) 272-0130
Counsel for Petitioners

336 F.3d 570

In the United States Court of Appeals for the Seventh Circuit

Harold Frank and Forest County Potawatomi Community of Wisconsin, Plaintiffs-Appellants,

v.

Forest County, et al., Defendants-Appellees.

Appeal from the United States District for the Eastern District of Wisconsin

No. 01-C-0847 – Thomas J. Curran, *Judge*

Argued December 10, 2002 – Decided July 15, 2003

Before Flaum, *Chief Judge*, and
Posner and Williams, *Circuit Judges*.

POSNER, Circuit Judge.

This suit by an Indian tribe (and a member of the tribe, but we can ignore that detail) claims that a county board of supervisors redistricted the county in a manner that violated both the equal protection clause and the Voting Rights Act, 42 U.S.C. § 1973. The district court granted summary judgment for the defendants (collectively, the County), *Frank v. Forest County,* 194 F.Supp.2d 867 (E.D.Wis.2002), and the tribe appeals.

The oddness of the tribe's claims is made dramatically clear by the facts of the case. Forest County is a large (1014 square miles) but sparsely populated (barely 10,000 people) county in the extreme northeastern corner of Wisconsin, fronting on Lake Superior. The population is unevenly distributed across the county; 57 percent of the 1620 census blocks into which the county is divided have no human inhabitants at all. The county is governed by a

board of supervisors each of whose 21 members is elected from a single-member district in nonpartisan elections held every two years. The board redistricted the county after learning the results of the 2000 census, which revealed a marked increase in the Indian population since the 1990 census, from 8 percent to almost 12 percent (45 percent of the Indians live on reservations). The rest of the county's population is white, except for a very small number of blacks (only 118 on census day) almost all of whom (106) are residents of the Blackwell Job Corps Civilian Conservation Center, which offers a comprehensive educational and job-training program for "at risk" youth ages 16 through 24. The residents of the center, a majority of whom are black, are transients; the average length of their stay is only 188 days. Only 57 percent are Wisconsinites, and very few either come from Forest County or plan to remain there when their stint at the center is up.

If the 21 districts that elect supervisors each had 477 residents, the districts would be of equal population. The district map adopted by the board of supervisors and challenged by the tribe does not hit this nail on the head. One district, the largest, has 514 residents, and another, the smallest, has 428 residents, the others being of essentially uniform size. The difference between the largest and the smallest (86) is 18 percent of 477. The County admits, prematurely as we are about to see, that this deviation from perfect equality, because it exceeds 10 percent, constitutes a prima facie denial of equal protection. But it argues (and the district court agreed) that the deviation is defensible because to redraw the district lines in a way that would reduce the deviation to 10 percent would produce districts that were not compact and that crossed

many local-government boundaries, so that school districts, fire districts, and so forth would straddle board of supervisor districts. The districts created by the board's plan are compact; there is no evidence that they are gerrymandered, whether along political or racial lines. The tribe points out, however, that the board's argument for why the 18 percent deviation is tolerable in the circumstances appears nowhere in the minutes of the meeting at which the board adopted the new district map over the tribe's objection.

The 10 percent norm on which the tribe's equal protection claim pivots represents the latest in a series of steps toward the ever greater automation of the redistricting process. Because the U.S. population is so mobile, there are large population shifts across thousands of federal, state, and local government districts between the decennial censuses. Redistricting is an intensely political process and there is no theoretical guidance to how to balance the various considerations that political science might deem relevant to conforming districted governments to the principles of democracy (themselves contested). So the judicial tendency has been to insist on a very close approach to mathematical equality, and one of the devices used is the 10 percent norm. "Our decisions have established, as a general matter," the Supreme Court has said, "that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State." *Brown v. Thomson,* 462 U.S. 835, 842-43, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983) (citations omitted); see also *Regensburger v. City of Bowling Green,* 278 F.3d 588, 595 (6th Cir.2002).

Rules are attractive devices for economizing on litigation costs and minimizing judicial discretion; and safe harbors are particularly welcome to the bar. But a rule applied to circumstances remote from those contemplated when it was adopted can produce perverse results. The 10 percent rule, viewed not as a safe harbor (which it is in part, and unexceptionably) but as a rule of prima facie liability (which it also is – both aspects are clear from the passage we quoted from *Brown v. Thomson*), was devised for elections in large electoral units. See, e.g., *Voinovich v. Quilter,* 507 U.S. 146, 149, 161-62, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993); *Brown v. Thomson, supra,* 462 U.S. at 838-39, 103 S.Ct. 2690; *Connor v. Finch,* 431 U.S. 407, 416-17, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977); *Daly v. Hunt,* 93 F.3d 1212, 1215, 1221 (4th Cir.1996); *Garza v. County of Los Angeles,* 918 F.2d 763, 773 n. 4 (9th Cir.1990). Even the city council districts in the modest-sized city of Bowling Green, Ohio, were almost 15 times more populous than the districts in our case. *Regensburger v. City of Bowling Green, supra,* 278 F.3d at 592 n. 1. The smaller and more scattered the population of the area to be redistricted and the more numerous the districts, making it harder to create districts of equal population without creating weird shapes that straddle the boundaries of the smaller government units, as recognized early on by the Supreme Court in *Abate v. Mundt,* 403 U.S. 182, 185, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971), the more arbitrary the rule of 10 percent prima facie liability becomes, until finally it becomes absurd. It is true that in *Chapman v. Meier,* 420 U.S. 1, 24, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975), the Court said that "sparse population is not a legitimate basis for a departure from the goal of equality." But the districts in question were roughly 25 times as populous as the districts in our case and anyway it would

be improper to give sparsely populated areas greater representation than densely populated ones. See *id.* at 25 n. 16, 95 S.Ct. 751. At all events, even if intended to apply to the tiniest electoral districts, the 10 percent rule is merely one of prima facie liability, and is therefore rebuttable, *Voinovich v. Quilter, supra,* 507 U.S. at 161-62, 113 S.Ct. 1149 – and more easily so the smaller the population of the area to be redistricted, the more unevenly the population is distributed across the area, and the more numerous the districts. Let us elaborate on these points, beginning with population size.

No one supposes that the census is totally accurate, see *Wisconsin v. City of New York,* 517 U.S. 1, 6-7, 116 S.Ct. 1091, 134 L.Ed.2d 167 (1996); and to bring the 18 percent deviation of which the tribe complains down to 10.9 percent would require subtracting only 16 people from the census count in the largest district and adding only 20 to the count in the smallest, which are changes that may well be within the census-takers' margin of error. Over a larger population, mistakes of overcounting and mistakes of undercounting will tend to cancel out. For example, the 1990 census is believed to have overcounted the national population by about 1.6 percent, but the small (relative) size of the error was the consequence of the fact that the 15-million gross overcount and 10-million gross undercount largely canceled each other out. See U.S. Census Monitoring Board, "Final Report to Congress" 16-17 and n. 11 (Sept 1, 2001), available at http://govinfo.library.unt.edu/cmb/cmbp/reports/final_report/FinalReport.pdf. But this cannot be assumed in the case of a minute local population. Moreover, more than three years have elapsed since the 2000 census was conducted, and during that time the movement of a few families across district

lines in Forest County may have decisively altered the deviation on which the tribe relies to show a denial of equal protection. The significance of population shifts as a function of the time from the census-taking to the court challenge was recognized in *Abrams v. Johnson,* 521 U.S. 74, 100-01, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997); here we add that the significance is also greater the smaller the population – and also the smaller the redistricted area is geographically, since people are more likely to move short than long distances.

Number of districts is important too, as we recognized in *Sutton v. Dunne,* 681 F.2d 484, 487 (7th Cir.1982). The more districts there are, the less meaningful a comparison between just two of the districts is. If there are four districts in the electoral unit, and the largest and the smallest have very different populations, the unit itself is seriously malapportioned. If there are a hundred, the malapportionment created by two outliers is apt to be at once trivial and unavoidable. Twenty-one, the number of districts in our case, is a large number from this perspective.

All this said, the board didn't provide much in the way of an explanation for the particular districting choices it made out of the almost infinite array theoretically available. (There are an unbelievably vast number of district configurations that would result in districts in Forest County of equal population.) But as with most other cases in which governmental action is challenged as a violation of the federal Constitution, it should be enough that good reasons *can* be given for the action, whether or not they were articulated in advance of the action. E.g., *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); *McDonald v. Board of*

Election Commissioners, 394 U.S. 802, 809, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969); *Estate of Kunze v. Commissioner,* 233 F.3d 948, 954 (7th Cir.2000). This precept is especially appropriate when one is dealing with so tiny a polity as Forest County, Wisconsin. We intend no disrespect in saying that the exceedingly modest functions that the State of Wisconsin has assigned to the board of supervisors of this remote rural county preclude any reasonable expectation of a deliberative process that we might expect of the Congress of the United States on one of its better days. Indeed we are mystified as to how this suit, with its impressive array of expert witnesses, was financed by either side; we are reluctant to impose upon the board a requirement of process that will burden the county government with expenses disproportionate to either its resources or its responsibilities. The supervisors are elected in nonpartisan elections, and their principal responsibility appears to be limited to keeping the county roads in good shape.

The tribe's voting-rights claim, to which we now move, is in great tension with its equal protection claim. The Voting Rights Act, so far as bears on this case, entitles a minority to seek district configurations that will sufficiently concentrate the minority population to enable it to elect some officials of its choice. 42 U.S.C. § 1973(b); *Thornburg v. Gingles,* 478 U.S. 30, 47, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986); *Barnett v. City of Chicago,* 141 F.3d 699, 702 (7th Cir.1998); *Milwaukee Branch of the N.A.A.C.P. v. Thompson,* 116 F.3d 1194, 1196 (7th Cir.1997). The County's map creates one district in which Indians have 78 percent of the total population and 75 percent of the voting-age population, and another in which Indians have 53 percent of the total population but only 49 percent of

the voting-age population. The final plan presented by the tribe in the district court would leave these districts intact but would alter the boundaries of another district to bring the Job Corps center that we mentioned earlier into the same district with a number of Indians, creating a district that would have a total population that was 49 percent Indian and 20 percent black and a voting-page population that was 39 percent Indian and 24 percent black.

What is remarkable about this plan is that it does not alter the largest and smallest districts in the County's plan and thus does not remedy the alleged denial of equal protection. As an afterthought on appeal the tribe argues that the deviation in population between those districts can be rectified consistently with creating the Indian-black district that is obviously the particular object of the lawsuit. But there is no map to indicate district boundaries and so we cannot evaluate the new plan. *Barnett v. City of Chicago, supra,* 141 F.3d at 702.

As it happens, both of the "deviant" districts are predominantly white; the larger is only 1.5 percent Indian and the smaller only 2.5 percent Indian, and the larger has a single black resident and the smaller none. The voters harmed by the deviation are the voters in the large(st) district, each of whom has less voting power than the voters in the other districts (and particularly the voters in the smallest district), but almost all of them are white – and there are no white plaintiffs. What is more, although the voting power of Indian residents is diluted in the large district, the dilution is more than offset in the small one because it has a larger Indian population, although the numbers are minute (8 Indians in the large district, 11 in the small). There thus does not seem to be any Indian interest in eliminating the alleged violation of

equal protection, which is probably why the tribe did not bother to submit a plan to the district court that would eliminate the violation without compromising the tribe's goal of obtaining a combined Indian and black district.

In arguing for moving boundary lines to create a district that will give Indians and blacks together a majority of the population, the tribe points to studies of the voting patterns of blacks and Indians that indicate that the two groups have similar electoral preferences, so that by being concentrated in the same district each can hope for better representation of its interests than if Indians and blacks were scattered across districts dominated by whites. There are cases that support the argument, *Campos v. Bay Town,* 840 F.2d 1240, 1244, 1244 (5th Cir.1988); *League of United Latin American Citizens, Council No. 4434 v. Clements,* 986 F.2d 728, 785-86 (5th Cir.1993); *Bridgeport Coalition for Fair Representation v. City of Bridgeport,* 26 F.3d 271, 275 (2d Cir.), rev'd on other grounds, 512 U.S. 1283, 115 S.Ct. 35, 129 L.Ed.2d 931 (1994); *Badillo v. City of Stockton,* 956 F.2d 884, 891 (9th Cir.1992); *Concerned Citizens of Hardee County v. Hardee County Board of Commissioners,* 906 F.2d 524, 526 (11th Cir.1990); contra, *Nixon v. Kent County,* 76 F.3d 1381, 1393 (6th Cir.1996) (en banc), but the Supreme Court has reserved the issue, *Growe v. Emison,* 507 U.S. 25, 41, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), and its problematic character is vividly shown by the present case. The studies of black and Indian voting on which the tribe relies are limited to voting in Presidential elections – a far cry from voting in county board elections – and particularly inapplicable to the only black population to which the tribe's plan pertains, namely the black residents of the Job Corps center. So far as the record shows, the only thing they have in common with the Potawatomi

Indians who live in the proposed district is that they are not Caucasian. The Indians are among the most rooted inhabitants of Forest County, having lived there since the 1880s. The black residents of the Job Corps Center are the least rooted and most transient. So far as appears, they do not mix with the surrounding population. And while the Indians and these blacks may conceivably have similar preferences in state or federal elections, the suggestion that they have similar preferences, different from those of whites, concerning road maintenance in Forest County strikes us as ludicrous. County roads are not a racial issue.

It is no surprise that the residents of the Job Corps center apparently do not vote at all in local elections. On election day, assuming continuous turnover, the average remaining stay of such a resident is only 94 days (188/2). Even if a resident had strong views on county roads, the election of a supervisor sharing those views could not be expected to have any actual effect on road building or road maintenance until long after the resident had departed. A supervisor's term does not begin on election day, and contracts for road building and maintenance are not let and performed instantaneously.

The tribe admits that it has no evidence that the Job Corps residents have any interests in county government that are in common with those of the Indians, but argues that since no evidence is available on the question the studies of state and national elections should carry the day for it. But when the party with the burden of proof cannot obtain evidence to sustain the burden, he loses.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

HAROLD FRANK and FOREST COUNTY POTAWATOMI COMMUNITY OF WISCONSIN,

Plaintiffs,

v.

Case No. 01-C-847

FOREST COUNTY, THE FOREST COUNTY BOARD OF SUPERVISORS, and ELIZABETH ISON,

Defendants.

ORDER

(Filed May 16, 2002)

Having considered the briefs and other papers filed by the parties, the court ORDERS that the Plaintiffs' "Rule 59(e) Motion for Reconsideration of Judgment on Plaintiffs' Equal Protection Claim" (filed April 5, 2002) IS DENIED. The Plaintiffs did not meet their burden of proving an equal protection claim at trial. The Defendants, on the other hand, offered sufficient evidence to justify the population deviation in the Forest County redistricting plan. *See* Federal Rule of Civil Procedure 59(e).

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin, this 16th day of May, 2002.

/s/ Thomas J. Curran
Thomas J. Curran
United States District Judge

---

194 F.Supp.2d 867 (E.D.Wis. 2002)

Harold FRANK and Forest County Potawatomi Community of Wisconsin, Plaintiffs,

v.

FOREST COUNTY, the Forest County Board of Supervisors, and Elizabeth Ison, in her Official Capacity, Defendants.

No. 01-C0847.

United States District Court,
E.D. Wisconsin.

March 22, 2002.

Matthew W. O'Neill, Friebert, Finerty & St. John, S.C., Milwaukee, WI, for Plaintiff or Petitioner.

Nathan A. Fishbach, Whyte Hirschboeck Dudek, S.C., Milwaukee, WI, for Defendant or Respondent.

DECISION AND ORDER

CURRAN, District Judge.

The Forest County Potawatomi Community of Wisconsin, a federally recognized Indian tribe, and Harold Frank, a member of the tribe, are suing Forest County, Wisconsin, the Forest County Board of Supervisors, and Elizabeth Ison, Forest County Clerk. The Plaintiffs claim that the Defendants' 2001 plan for redistricting the twenty-one Forest County supervisory districts deprives them of equal protection, *see* U.S. Const. amend. XIV, and violates Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973(b). The Plaintiffs ask that the 2001 plan be declared unconstitutional and that the election of Forest County supervisors scheduled for April

2, 2002, be enjoined. *See* 42 U.S.C. § 1983. Subject matter jurisdiction and venue are proper in this district. *See* 28 U.S.C. §§ 1331 & 1391. The Defendants have answered and have denied liability and that the Plaintiffs are entitled to any relief.

The parties filed cross motions for summary judgment. Then, after this case was transferred to this court, the motions and request for injunctive relief were combined with a trial to the court. The trial has now concluded, so the court will enter its findings of fact and conclusions of law. *See* Federal Rule of Civil Procedure 52.

I. *FINDINGS OF FACT*

Forest County is a sparsely populated county located on and near the northeastern boundary of the State of Wisconsin. With an area of 1,014.1 square miles and a total population of 10,024, the population density is 9.9 persons per square mile.[1] The county contains only one city – Crandon, the county seat – and fourteen towns.

During the decade from 1991 to 2000, Forest County's population increased 5.99%. Therefore, pursuant to state law, the twenty-one member County Board of Supervisors undertook to redistrict the supervisory districts based upon the results of the decennial United States Census for the year 2000. *See* Wis. Stat. § 59.110(3)(b)(1).

---

[1] In contrast, Wisconsin's most populated county, Milwaukee County, has an area of 241.6 square miles with a population of 940,016.00, resulting in a population density of 3,891.4 persons per square mile.

After the Board of Supervisors adopted its 2001 plan, the Defendants filed this lawsuit claiming that the plan violates their federal constitutional and statutory rights.

Prior to trial, the parties stipulated to the following historical facts which the court finds are supported by the record:

1. Harold Frank is an adult member of the FCPC and a resident of Forest County.

2. The Forest County Potawatomi Community of Wisconsin ("FCPC") is a federally recognized Indian Tribe with a mailing address of P.O. Box 346, Crandon, Wisconsin 54520.

3. Defendant Forest County (the "County") is a municipal corporation and body corporate pursuant to § 59.01, Wis. Stat.

4. Defendant Forest County Board of Supervisors (the "Board") is the governing body of the County, elected pursuant to § 59.10, Wis. Stats.

5. Defendant Elizabeth Ison, named in her official capacity, is the County Clerk for Forest County, with duties as set forth in § 59.23, Wis. Stats., including those duties with respect to elections as set forth in § 59.23(2)(n), Wis. Stats.

6. This action was commenced on August 22, 2001 pursuant to 42 U.S.C. § 1983 alleging violations of the Voting Rights Act, 42 U.S.C. § 1973, and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

7. Venue is appropriate in the Eastern District of Wisconsin, as all of the acts complained of allegedly occurred in Forest County, Wisconsin.

8. In 2000, the United States Census Bureau conducted a decennial federal census of population. On or about April 2, 2001, Forest County received from the Wisconsin Legislative Reference Bureau ("LRB") the "2000 Federal Census of Population: Wisconsin Block Level Data" for Forest County. The data was extracted by the LRB from the Census 2000 Redistricting Data Summary File for Wisconsin.

9. Pursuant to § 59.10(3)(b), Wis. Stats., the Board began the process of redistricting the county supervisor seats upon the County's receipt of the 2000 Census data.

10. The Board created a County Board Reapportionment Committee ("Reapportionment Committee," also referred to as the "Redistricting Committee"). The Redistricting Committee initially held public meetings regarding redistricting on May 2, 11 and 22, 2001. The meeting of May 22, 2001 included a public hearing.

11. The Board enlisted the services of the North Central Wisconsin Regional Planning Commission ("NCWRPC") to help analyze the census data and prepare tentative supervisory district plans.

12. During the redistricting process, the Board and the NCWRPC utilized census data reflecting total population figures.

13. The 1991 Forest County Supervisory District Plan (the "1991 County Plan") included one district with a majority of Native Americans, located in the Town of Nashville (then District 21).

14. A map accurately depicting the 1991 County Plan is attached hereto as Exhibit E.

15. By letter dated April 12, 2001, the FCPC requested that the County create two additional county supervisory districts with a majority of Native Americans. The FCPC requested the creation of Native American majority districts in the Town of Lincoln and the Town of Wabeno. The FCPC presented its request for a Native American district in Wabeno at the May 11, 2001 Redistricting Committee meeting, the May 29, 2001 County Board meeting, the August 14, 2001 Redistricting Committee Meeting and the August 21, 2001 County Board meeting.

16. On May 29, 2001, the Board adopted a tentative supervisory district plan (the "Tentative Plan") pursuant to § 59.10(3)(b)1, Wis. Stats.

17. The Tentative Plan did not include a majority district for the Native Americans residing in Wabeno. Under the Tentative Plan, the Native Americans residing in the Wabeno area were located in Districts 5, 7, and 8, with 42 Native Americans in District 5, 207 Native Americans in District 7, and 35 Native Americans in District 8 (using total population, and not voting age population, figures).

18. By letter dated August 10, 2001 and received by the NCWRPC on August 13, 2001, the FCPC requested that District 7 in the Tentative Plan be adjusted to include an additional 35 Native Americans (using total population, and not voting age population, figures).

19. With the same letter, the FCPC provided the NCWRPC for the first time with a plan suggesting alternate boundaries for the supervisory districts in the Wabeno area. This Plan will be

referred to as "FCPC Plan 1" and is attached as Exhibit B to these Stipulated Findings.

20. The FCPC presented FCPC Plan 1 to the Redistricting Committee for the first time at a public meeting on August 14, 2001. The Redistricting Committee approved the Tentative Plan for recommendation to the Board at that meeting.

21. On August 21, 2001, the Board held a public hearing on the Tentative Plan. During the hearing, the FCPC requested that the Board adopt FCPC Plan 1.

22. On August 21, 2001, the Forest County Board adopted the Tentative Plan as the final supervisory district plan (the "2001 County Plan"). The 2001 County Plan is attached as Exhibit A to these Stipulated Findings.

23. FCPC Plan 1 was received by the NCWRPC from plaintiffs on August 13, 2001 and presented by the FCPC to the Redistricting Committee on August 14, 2001. This plan was prepared by plaintiffs' expert, Frederick P. Kessler. FCPC Plans 2 and 3, which are also prepared by Frederick Kessler, were provided to defendants along with plaintiffs' expert disclosures on November 1, 2001.

24. Copies of maps reflecting the relevant plans, as well as a population analysis of each plan (excerpted from the analyses prepared by defendants' expert Kimball Brace) are attached to these Stipulated Facts. The Exhibits are as follows:

Exhibit A 2001 County Plan (and analyses) (although titled differently, this map

shows the same information as the map attached to Brace's report as Exhibit 9)

Exhibit B FCPC Plan 1 (and analysis)

Exhibit C FCPC Plan 2 (and analysis)

Exhibit D FCPC Plan 3 (and analysis)

Exhibit E 1991 County Plan

The population analyses for each 2001 plan show: (1) a summary of the plan and the total or maximum deviation from the ideal district size; (2) the racial breakdown of each plan based on the total population of the districts; and (3) the racial breakdown of each plan based on the voting age population ("VAP") of the districts.

25. According to the 2000 Census, Forest County has a total population of 10,024 people. With 21 supervisory districts, the so-called "ideal" district size in terms of the "one person, one vote" doctrine of the Equal Protection Clause is 477 people (10,024/21 = 477.33).

26. For purposes of plaintiffs' Equal Protection challenge, the "total deviation" (also known as the "maximum deviation") of a plan may be determined by taking the difference between the highest and lowest populated districts and dividing that number by the "ideal" district size of 477.

27. In the 2001 County Plan, District 2 has the highest population (514) and District 12 has the lowest population (428) (a difference of 86 people). The 2001 County Plan thus has a total or maximum deviation of 18.03% (86/477 = .1803).

28. The three plans presented by plaintiffs do not alter the boundaries of Districts 2 and 12.

29. The average deviation for all of the 21 districts under the 2001 County Plan is 3.585%.

30. The 2000 Census reflected the following population growth in Forest County from 1990 to 2000:

Change in Population in Forest County

	1990	2000	Raw Change	% Change	% of Total Pop. Change
Total Pop	8,733	10,024	1,251	14.26%	100%
Native Amer.	777	1,173	396	50.97%	32%
White	7,822	8,570	748	9.56%	60%

---

31. In the 2001 County Plan, the Native American population of Districts 13 and 17 is as follows:

a. In District 13 (located in the Town of Nashville on the Mole Lake Chippewa Reservation), Native Americans constitute 77.68% of the total population. Using voting age population figures, Native Americans represent 75.09% of the population of District 13.

b. In District 17 (located in the Town of Lincoln), Native Americans constitute 52.64% of the total population and 49.35% of the voting age population.

32. None of plaintiffs' three plans alters the boundaries of Districts 13 and 17.

33. Plaintiffs' Voting Rights Act challenge is focused on District 7 in the 2001 County Plan.

34. Under the 2000 Census, Wabeno has a total population of 1,264 people.

35. District 7 in the 2001 County Plan is located in Wabeno, and includes portions of the Potawatomi Reservation. As currently adopted, District 7 has the following racial makeup (these Stipulated Facts will include only the figures for White, Native American and Black residents):

Final Plan – District 7 – Total Population

DIST.	Total Pop.	White	% of Total	Native Amer.	% of Total	Black	% of Total
7	488	274	56.15%	207	42.42%	0	0.00%

36. FCPC Plans 1 and 2 have the following racial makeup in District 7:

FCPC Plans 1 and 2 – District 7 – Total Population

DIST.	Total Pop.	White	% of Total	Native Amer.	% of Total	Black	% of Total
7	470	221	47.02%	242	51.49%	0	0.00%

FCPC Plans 1 and 2 – District 7 – Voting Age Population ("VAP")

DIST.	Total VAP	White	% of VAP	Native Amer.	% of VAP	Black	% of VAP
7	288	163	56.60%	122	42.36%	0	0.00%

37. The third plan prepared the plaintiffs, FCPC Plan 3, has the following racial makeup in District 7:

FCPC Plan 3 – District 7 – Total Population

Dist.	Total Pop.	White	% of Total	Native Amer.	% of Total	Black	% of Total	Total NA & Black	% of Total
7	481	135	28.07%	234	48.65%	96	19.96%	328	68.19%

FCPC Plans 3 – District 7 – Voting Age Population ("VAP")

Dist.	Total VAP	White	% of VAP	Native Amer.	% of VAP	Black	% of VAP	Total NA & Black	% of VAP
7	297	97	32.66%	117	39.39%	72	24.24%	189	63.63%

38. The next regularly scheduled election for the Forest County Board of Supervisors is April 2, 2002.

39. In District 7, a Native American candidate, Louis Spaude, is challenging the incumbent supervisor, Scott Schaffer, Jr.

40. In District 11, incumbent Erhard Huettl has a challenger, Charles Otter.

41. In District 15, two non-incumbents, Shirley Mills and Alfred Wilson, are running against each other. There is no incumbent running for this seat.

42. In District 16, Chester Gryczkowski is challenging incumbent Jack Kloss.

43. In District 20, Bill Schultz is challenging incumbent Paul E. Spence.

Stipulated Findings of Fact at 1-10 (citations omitted).

II. *CONCLUSIONS OF LAW, DISCUSSION AND DECISION*

A. *EQUAL PROTECTION*

Based on these facts, the Plaintiffs claim that they have been deprived of the "one person, one vote"[2]

[2] The phrase "one person, one vote" does not appear in the Fourteenth Amendment. It derives from the following passage in *Gray v. Sanders*, 372 U.S. 368, 381, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963): "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and

(Continued on following page)

guarantee of the Fourteenth Amendment because the twenty-one supervisory districts in Forest County do not contain an equal number of people. The 2000 United States Census shows that the population of Forest County is 10,024. Therefore, ideally, each supervisory district should contain 477 people. In the 2001 County Plan, District 2 has the highest population (514) while District 12 has the lowest population (428). The difference of 86 people results in a maximum deviation of 18.03%.

In *Reynolds v. Sims,* 377 U.S. 533, 560-61, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), the United States Supreme Court applied the Equal Protection Clause's guarantee of one person, one vote to state legislatures, stating that: "the fundamental principle of representative government is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state." *See also Avery v. Midland County,* 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968) (applying the one person, one vote principle to local government). In *Sims* and subsequent cases, the Court recognized that precise mathematical population equality is not possible in many cases. *See Reynolds,* 377 U.S. at 577, 84 S.Ct. 1362.

Since *Reynolds,* the Court has refined the parameters for determining when population differences among legislative districts unconstitutionally dilute the votes of the members of the larger districts. In *Gaffney v. Cummings,* 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973), the

---

Nineteenth Amendments can mean only one thing – one person, one vote."

Court held that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." *Id.* at 745, 93 S.Ct. 2321. Similarly, in *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), the Court said, "we do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation." *Id.* at 764, 93 S.Ct. 2332.

The Court has come to recognize what is generally regarded as a benchmark for determining whether a particular apportionment plan violates the one person, one vote principle. In *Brown v. Thomson,* 462 U.S. 835, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983), the Court observed that: "Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a *prima facie* case of discrimination and therefore must be justified by the State." *Id.* at 842-43, 103 S.Ct. 2690 (citations omitted); *cf. Connor v. Finch,* 431 U.S. 407, 418, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977) ("The maximum population deviations of 16.5% in the Senate districts and 19.3% in the House districts can hardly be characterized as *de minimis;* they substantially exceed the 'under-10%' deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionments.") Thus, the Court's one person, one vote cases have generally established three levels for gauging whether population

deviations between voting districts violate the Equal Protection Clause. If the maximum deviation is less than 10%, the population differential will be considered *de minimis* and will not, by itself, support a claim of vote dilution. If the maximum deviation is greater than 10%, it is *prima facie* evidence of a one person, one vote violation, and the state may justify the population disparity by showing a rational and legitimate state policy for the districting plan. *Brown,* 462 US. at 842-43, 103 S.Ct. 2690. Finally, there is a level of population disparity beyond which a state can offer no possible justification. Although it is not clear precisely what that upper level is, the Court has stated in dictum that a maximum deviation of 16.4% "may well approach tolerable limits." *Mahan v. Howell,* 410 U.S. 315, 329, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973).

In this case, the Plaintiffs have established a *prima facie* case of vote dilution by demonstrating a population deviation in excess of ten percent. *See Voinovich v. Quilter,* 507 U.S. 146, 161, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993). Such a showing shifts to the Defendants the burden of justifying the deviation, which requires them: (1) to articulate a rational state policy that may justify the deviation; (2) to explain how the redistricting plan may reasonably be said to advance the rational state policy; and (3) to demonstrate that the resulting deviation does not exceed constitutional limits. *See Mahan v. Howell,* 410 U.S. 315, 328, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973); *Regensburger v. City of Bowling Green, Ohio,* 278 F.3d 588, 595 (6th Cir.2002).

At trial, the Defendants met their burden by proving that the 2001 redistricting plan is rationally related to state policies that justify the deviation. The districts were drawn with regard to traditional redistricting principles:

equal population, contiguity, compactness, and respect for municipal boundaries. These considerations reflect the law found in Chapter 59 of the Wisconsin Statutes, which states that the creation of supervisory districts for a county with the population of Forest County is to be determined as follows:

> Within 60 days after the population count by block, established in the decennial federal census of population, and maps showing the location and numbering of census blocks become available in printed form from the federal government or are published for distribution by an agency of this state, but no later than July 1 following the year of each decennial census, each board shall propose a tentative county supervisory district plan setting forth the number of supervisory districts and tentative boundaries or a description of boundary requirements, hold a public hearing on the proposed plan and adopt a tentative plan. The proposed plan may be amended after the public hearing. The board shall solicit suggestions from municipalities concerning the development of an appropriate plan. The board shall transmit to each municipal governing body in the county the tentative plan that is adopted. Each district shall consist of whole wards or municipalities. Each district shall be designated to be represented by one supervisor, and all districts shall be substantially equal in population. In the tentative plan, the board shall, whenever possible, place whole contiguous municipalities or contiguous parts of the same municipality within the same district. If the division of a municipality is sought by the board, the board shall provide with the plan a written statement to the municipality affected by each proposed division

> specifying the approximate location of the territory from which a ward is sought to be created for contiguity purposes and the approximate population of the ward proposed to effectuate the division.

Wis. Stat. § 59.10(3)(b)(1).

Changes during a decade are to be addressed as follows:

> Changes during decade. After the enactment of a plan of supervisory districts under par. (b), a municipal incorporation, annexation, detachment or consolidation may serve as a basis for altering between federal decennial censuses the boundaries or supervisory districts, in the discretion of the board. The number of supervisory districts in the county shall not be changed by any action under this paragraph. Any plan of county supervisory districts enacted under par. (b) may be amended under this paragraph but shall remain in effect as amended until superseded by another plan enacted by the board under par. (b) and filed with the secretary of state.

Wis. Stat. § 59.10(c).

In addition to these state mandated considerations, the Defendants also attempted to avoid diluting the Native American influence in Districts 17 and 13 and to protect existing communities of interest based on the provision of fire fighting and emergency medical services and school district boundaries. In some instances, balancing the population of districts came into conflict with the desire to preserve municipal boundaries. However, Ronald Weber, the Defendants' expert, was able to justify the

supervisors' decision to split eight townships. *See* Declaration of Dr. Ronald E. Weber at ¶¶ 10-12. The result was a 2001 plan with an average deviation for all twenty-one districts of 3.585% and a maximum deviation of 18.03%.

Although the maximum deviation in Forest County pushes the outer limits of what has been tolerated by the United States Supreme Court, the court concludes that the Defendants have not violated the Equal Protection Clause. The Defendants have articulated a rational state policy that justifies the deviation; they have explained how their redistricting plan advances the rational state policy; and, they have demonstrated that the resulting deviation does not exceed constitutional limits for local governments. In addition, there is no evidence in the record that the Defendants intended to discriminate against the Plaintiffs. *See Smith v. Boyle,* 144 F.3d 1060, 1064 (7th Cir.1998) ("to be actionable a denial of equal protection must be intentional"). To the contrary, the evidence shows that the Defendants attempted to maximize the ability of the Native Americans in Forest County to elect supervisors of their preference. Therefore, the court will not grant relief on the Plaintiffs' Fourteenth Amendment cause of action.

III. *VOTING RIGHTS ACT*

Next, the Plaintiffs' claim that Forest County's 2001 plan violates Section 2 of the Voting Rights Act of 1965, as amended. *See* 42 U.S.C. § 1973(b). Section 2 of the Voting Rights Act prohibits any voting procedure that "results in a denial or abridgement of" the voting rights of a person on account of race, color, or membership in a language minority. 42 U.S.C. § 1973(a). A violation of section 2 is established by showing that "based on the totality of the

circumstances," members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). By its terms, Section 2 does not establish an entitlement to proportional representation. Rather, the statute provides that: "The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered: Provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). As amended in 1982, the Voting Rights Act (unlike the Equal Protection Clause) does not require proof of intent to discriminate. The burden of proof is on the party seeking to establish a Section 2 violation.

The vote dilution inquiry under Section 2 involves two steps. First, Plaintiffs must show that three threshold conditions exist – the *"Gingles"* factors. *See Thornburg v. Gingles,* 478 U.S. 30, 50-51, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Specifically, Plaintiffs must show that: (1) the population of Native Americans is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) Native Americans are "politically cohesive" and (3) "the white majority votes sufficiently as a bloc to enable it in the absence of special circumstances . . . usually to defeat the (Native Americans') preferred candidate." *Id.* Second, and only if the three *Gingles* factors are met, the court must decide the ultimate question of vote dilution. In doing so the Court must determine whether, "on the totality of circumstances," Native Americans have been denied an equal opportunity to participate in the political process and to

elect representatives of their choice. *See* 42 U.S.C. § 1973(b).

In *Gingles,* the Supreme Court pointed to an exemplary list of factors that are important in any Section 2 vote dilution inquiry. *See Gingles,* 478 U.S. at 44-45, 106 S.Ct. 2752. The factors were taken from a list in the Senate Judiciary Committee Majority Report that accompanied the bill amending the Voting Rights Act in 1982. *Id.* at 36, 106 S.Ct. 2752. The "Senate Factors" to which the *Gingles* Court refers are:

> "1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process";
>
> "2. the extent to which voting in the elections of the state or political subdivision is racially polarized";
>
> "3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group";
>
> "4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> "5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process";

> "6. whether political campaigns have been characterized by overt or subtle racial appeals";
>
> "7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
>
> "Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are":
>
> "[8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> "[9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous."

Id. at 36-37, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (quoting S.Rep. No. 97-417 at 28-29 (1982)) *reprinted in* U.S.C.C.A.N. 177, 206-07.

According to the 2000 census, there are 662 Native Americans of voting age residing in Forest County which has a total voting age population of 7,488. Therefore, Native Americans of voting age comprise 8.84% of the voting age population. The Plaintiffs point out that the total population of Forest County is 10,024, including 1,173 Native Americans, so that Native Americans comprise 11.70% of the total population of Forest County. Using the total population statistics, the Plaintiffs conclude that they are entitled to elect three of the twenty-one county supervisors, while the Defendants maintain that the voting age population statistics justify fewer than two Native American majority districts.

Under the 2001 Forest County plan, supervisory District 13 is located in the Town of Nashville on the Mole Lake Chippewa Reservation. Native Americans constitute 75.09% of the voting age population of that district. In District 17, located in the Town of Lincoln, Native Americans constitute 52.64% of the total population and 49.35% of the voting age population. Although District 17 could be termed an "influence" district rather than a Native American majority district, at trial the Defendants only argued for the creation of one additional Native American majority district. Thus, the Plaintiffs' Voting Rights Act challenge is focused on District 7 in the 2001 plan.

District 7 is located in the Town of Wabeno and includes portions of the Potawatomi Reservation. The total voting age population of District 7 is 288 of which 163 are Caucasians and 122 are Native Americans. The Plaintiffs urge the court to consider the total population (488), rather than voting age population. If total population is considered, 274 people are Caucasian and 207 are Native American. The Plaintiffs point out that the Native American population in the Wabeno area is increasing at a higher rate than in the rest of the Wabeno population, and argue that, under the theory of "virtual representation," the voting age Native Americans would also be representing their children. Therefore, total population figures should be used. Although this theory has been mentioned with mixed sentiments in dictum by Judge Posner, *see Barnett v. City of Chicago,* 141 F.3d 699, 704 (7th Cir.) ("a bizarre suggestion"/"not a ridiculous idea"), *cert. denied sub nom. Bialczak v. Barnett,* 524 U.S. 954, 118 S.Ct. 2372, 141 L.Ed.2d 740 (1998), the concept of virtual representation has been rejected in many contexts throughout the history of this country. *See* Reva B. Siegel, *She the People:*

The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 HARV, L. REV. 947 (2002) (discussing the pre-Nineteenth Amendment idea that women did not need the vote because their interests were represented by their husbands); Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Their Children? Toward a Conversational Understanding of American Democracy,* 94 NW. U.L. REV. 503, 522-27 (2000) (relating how the Founders rejected Edmond Burke's and King George III's theory that the colonists were being virtually represented by Englishmen in the British House of Lords); Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes,* TEX. L. REV. 1589, 1607-12 (1993) (rejecting notion of virtual representation of members of one race which has been deprived of voting rights by members of another race). The theory has never been accepted in a holding of the United States Supreme Court or the Seventh Circuit.[3] Instead, the Seventh Circuit has continued to adhere to the position that citizen voting age population figures must be used to measure proportionality. *See Barnett,* 141 F.3d at 705; *McNeil v. Springfield Park District,* 851 F.2d 937, 944-45 (7th Cir.1988), *cert. denied,* 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989).

---

[3] Even if these courts had accepted virtual representation in the context of voting, the Plaintiffs in this case have offered no evidence showing that Native American adult voters vote the same as their children would vote if they were eligible. At least one commentator believes that, given the vote, children would not vote like their parents. *See* Vita Wallace, *Give Children the Vote, The Nation,* October 14, 1991, at 439.

Faced with a lack of legal and factual support for the Plaintiffs' position, this court must reject that position and will use the voting age population figures. When voting age figures are used, the Plaintiffs' plans 1 and 2 do not meet the first *Gingles* factor-establishing that the Native American population is sufficiently large to constitute a majority in the proposed district. The Plaintiffs recognize this, but continue to argue that, because of the Native American birth rate, the number of Native Americans will exceed the number of other voting age people in the proposed District 7 within a few years.

The Wisconsin Statutes clearly require that redistricting be based upon the decennial census and not upon projections. *See* Wis. Stat. § 59.10. In the face of this statutory provision, the Plaintiffs have offered no legal authority to support the use of total population or projected total population to determine proportionality, so their position must be rejected, leading to the conclusion that their plans 1 and 2 do not pass muster under *Gingles*.

Finally, the Plaintiffs have offered a third plan under which portions of Wabeno would be placed in a district with the Town of Blackwell where a federal Job Corps facility is located. The voting age population of this district would be 297, including 117 Native Americans and 72 African Americans. The Plaintiffs say that the Native Americans and African Americans would comprise a coalition of 189 citizens who could elect a supervisor of their choice. At the same time, the Plaintiffs admit that the African Americans housed at the Blackwell Job Corps do not vote in local elections. Other than the fact that Native Americans in Menominee County, Wisconsin, and African Americans in Milwaukee County, Wisconsin, voted for the Democratic candidate in past presidential

elections, the Plaintiffs have offered no evidence to establish a community of interest among the Forest County Native Americans and the Job Corps students. In addition, there is no African American Plaintiff in this case. This not only undercuts the claim of shared interests, but also raises the concern that rulings in this case could have a preclusive effect on any future claims by African Americans in Forest County if the court found that their interests are represented by the Native American Plaintiffs.

Neither the United States Supreme Court nor the Seventh Circuit have held that the Voting Rights Act allows coalitions as proposed by the Plaintiffs. The Sixth Circuit has specifically rejected the concept on the ground that there is no support in the plain language of the statute. *See generally Nixon v. Kent County,* 76 F.3d 1381 (6th Cir.1996). *But see Campos v. City of Baytown, Texas,* 840 F.2d 1240, 1244 (5th Cir.1988), *cert. denied,* 492 U.S. 905, 109 S.Ct. 3213, 106 L.Ed.2d 564 (1989).

Regardless of whether coalitions are allowed under the Voting Rights Act, the Plaintiffs' plan 3 fails to meet the *Gingles* criteria that the group seeking representation prove that it is politically cohesive. This conclusion compels the court to reject the Plaintiffs' third plan and to conclude that the Plaintiffs have not met their burden of proving a violation of Section 2 of the Voting Rights Act.

ORDER

For the reasons explained above, the court ORDERS that the "Plaintiffs' Motion for Summary Judgment" (filed January 18, 2002) IS DENIED and that their request for injunctive relief is denied.

IT IS FURTHER ORDERED that the Defendants' "Motion for Summary Judgment" (filed January 18, 2002) IS GRANTED.

IT IS FURTHER ORDERED that this action is dismissed upon its merits.

IT IS FURTHER ORDERED that the Clerk of Court shall enter a final judgment as a separate document. *See* Federal Rule of Civil Procedure 58. This judgment shall provide that:

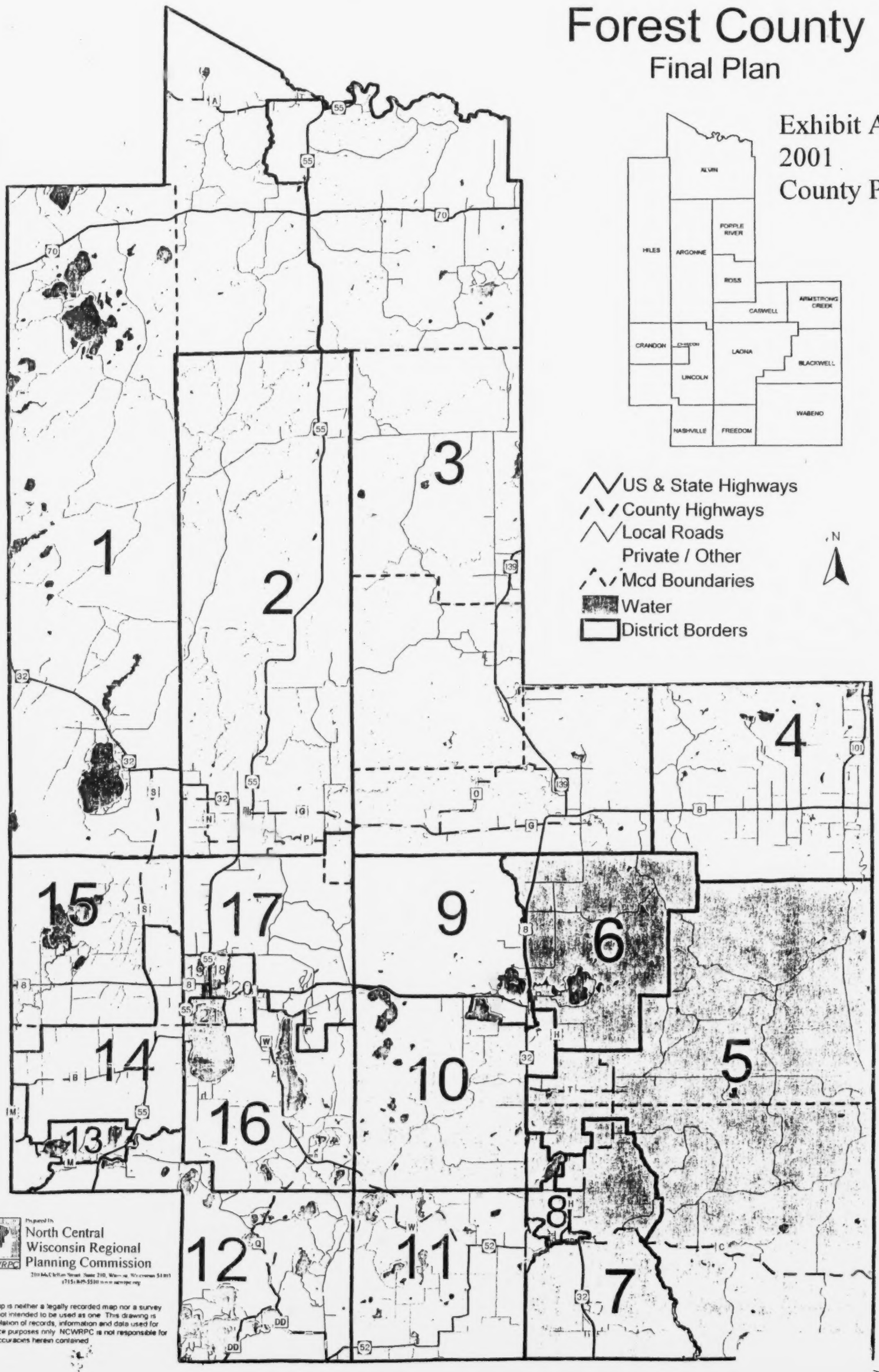
> This action brought by Plaintiffs Harold Frank and Forest County of Potawatomi Community of Wisconsin against Defendants Forest County, The Forest County Board of Supervisors, and Elizabeth Ison, in her Official Capacity, came before the court, the Honorable Thomas J. Curran, District Judge, presiding, and a decision having been rendered,
>
> IT IS ORDERED AND ADJUDGED
>
> that the Plaintiffs take nothing and that this action is dismissed upon its merits and that the Defendants recover of the Plaintiffs their costs of this action.

Forest County
Final Plan

Exhibit A
2001
County Plan

US & State Highways
County Highways
Local Roads
Private / Other
Mcd Boundaries
Water
District Borders

N



Prepared by
North Central
Wisconsin Regional
Planning Commission
NCWRPC

This map is neither a legally recorded map nor a survey and is not intended to be used as one. This drawing is a compilation of records, information and data used for reference purposes only. NCWRPC is not responsible for any inaccuracies herein contained.

BEST AVAILABLE COPY

2001 County Plan - Summary of Deviation from Ideal Size

DISTRICT	Total Population	Ideal Size	Deviation	Raw Dev.
1	447	477	-6.36%	-30
2	514	477	7.76%	37
3	491	477	2.86%	14
4	463	477	-3.00%	-14
5	451	477	-5.52%	-26
6	459	477	-3.84%	-18
7	488	477	2.24%	11
8	499	477	4.54%	22
9	481	477	0.77%	4
10	491	477	2.86%	14
11	485	477	1.61%	8
12	428	477	-10.27%	-49
13	448	477	-6.15%	-29
14	471	477	-1.33%	-6
15	472	477	-1.12%	-5
16	483	477	1.19%	6
17	492	477	3.07%	15
18	494	477	3.49%	17
19	484	477	1.40%	7
20	493	477	3.28%	16
21	490	477	2.65%	13
Highest	514	477	7.76%	37
Lowest	428	477	-10.27%	-49
Overall Rang	86	477	18.03%	86
Average			3.58%	17.1

2001 County Plan - Total Population
(White, Native American and Black only)

DISTRICT	Total Pop.	White	% of Total	Native Amer.	% of Total	Black	% of Total
1	447	435	97.32%	12	2.68%	0	0.00%
2	514	495	96.30%	8	1.56%	1	0.19%
3	491	469	95.52%	6	1.22%	3	0.61%
4	463	448	96.76%	3	0.65%	0	0.00%
5	451	301	66.74%	42	9.31%	96	21.29%
6	459	427	93.03%	21	4.58%	7	1.53%
7	488	274	56.15%	207	42.42%	0	0.00%
8	499	432	86.57%	35	7.01%	0	0.00%
9	481	466	96.88%	12	2.49%	0	0.00%
10	491	479	97.56%	10	2.04%	0	0.00%
11	485	473	97.53%	3	0.62%	4	0.82%
12	428	416	97.20%	11	2.57%	0	0.00%
13	448	97	21.65%	348	77.68%	0	0.00%
14	471	456	96.82%	13	2.76%	0	0.00%
15	472	457	96.82%	11	2.33%	2	0.42%
16	483	454	94.00%	20	4.14%	1	0.21%
17	492	213	43.29%	259	52.64%	0	0.00%
18	494	439	88.87%	42	8.50%	5	1.01%
19	484	435	89.88%	38	7.85%	3	0.62%
20	493	451	91.48%	38	7.71%	2	0.41%
21	490	453	92.45%	34	6.94%	0	0.00%
Totals	10024	8570	85.49%	1173	11.70%	124	1.24%

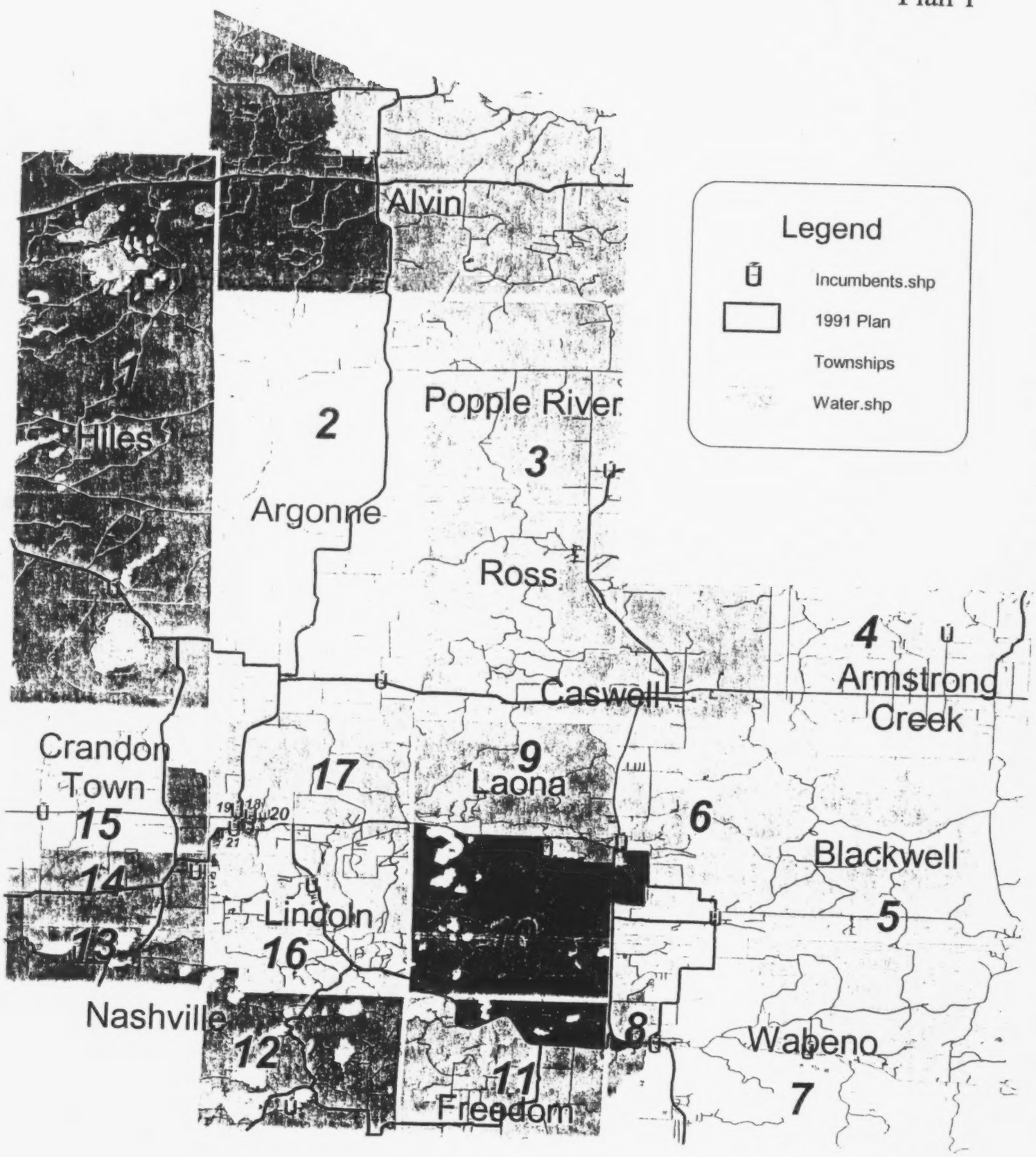
2001 County Plan - Voting Age Population (VAP)
(White, Native American and Black only)

DISTRICT	Voting Age Pop (VAP)	White	% of VAP	Native Amer.	% of VAP	Black	% of VAP
1	396	392	98.99%	4	1.01%	0	0.00%
2	373	362	97.05%	5	1.34%	1	0.27%
3	417	403	96.64%	5	1.20%	0	0.00%
4	355	347	97.75%	3	0.85%	0	0.00%
5	347	240	69.16%	25	7.20%	72	20.75%
6	322	304	94.41%	14	4.35%	3	0.93%
7	304	198	65.13%	103	33.88%	0	0.00%
8	361	330	91.41%	18	4.99%	0	0.00%
9	364	355	97.53%	6	1.65%	0	0.00%
10	379	372	98.15%	5	1.32%	0	0.00%
11	373	367	98.39%	0	0.00%	2	0.54%
12	389	379	97.43%	9	2.31%	0	0.00%
13	273	66	24.18%	205	75.09%	0	0.00%
14	335	328	97.91%	7	2.09%	0	0.00%
15	351	344	98.01%	5	1.42%	1	0.28%
16	404	388	96.04%	12	2.97%	0	0.00%
17	306	146	47.71%	151	49.35%	0	0.00%
18	346	321	92.77%	21	6.07%	2	0.58%
19	355	329	92.68%	22	6.20%	0	0.00%
20	370	341	92.16%	25	6.76%	2	0.54%
21	368	350	95.11%	17	4.62%	0	0.00%
Totals	7488	6662	88.97%	662	8.84%	83	1.11%

FCPC Plan

Forest County, Wisconsin

Exhibit B
FCPC
Plan 1



Produced by

Election Data Services

FCPC Plan 1 - Summary of Deviation from Ideal Size

DISTRICT	Total Pop.	Target	Deviation	Raw Dev.
1	447	477	-6.36%	-30
2	514	477	7.68%	37
3	491	477	2.86%	14
4	463	477	-3.00%	-14
5	476	477	-0.28%	-1
6	459	477	-3.84%	-18
7	470	477	-1.54%	-7
8	488	477	2.24%	11
9	481	477	0.77%	4
10	488	477	2.24%	11
11	492	477	3.07%	15
12	428	477	-10.34%	-49
13	448	477	-6.15%	-29
14	471	477	-1.33%	-6
15	472	477	-1.12%	-5
16	483	477	1.19%	6
17	492	477	3.07%	15
18	494	477	3.49%	17
19	484	477	1.40%	7
20	493	477	3.28%	16
21	490	477	2.65%	13
Highest	514	477	7.76%	37
Lowest	428	477	-10.27%	-49
Overall Range	86	477	18.03%	86
Average			3.23%	15.4

FCPC Plan 1 - Total Population
(White, Native American and Black Only

DISTRICT	Total Pop.	White	% of Total	Native Amer.	% of Total	Black	% of Total
1	447	435	97.32%	12	2.68%	0	0.00%
2	514	495	96.30%	8	1.56%	1	0.19%
3	491	469	95.52%	6	1.22%	3	0.61%
4	463	448	96.76%	3	0.65%	0	0.00%
5	476	361	75.84%	7	1.47%	96	20.17%
6	459	427	93.03%	21	4.58%	7	1.53%
7	470	221	47.02%	242	51.49%	0	0.00%
8	488	436	89.34%	29	5.94%	0	0.00%
9	481	466	96.88%	12	2.49%	0	0.00%
10	488	474	97.13%	12	2.46%	0	0.00%
11	492	467	94.92%	7	1.42%	4	0.81%
12	428	416	97.20%	11	2.57%	0	0.00%
13	448	97	21.65%	348	77.68%	0	0.00%
14	471	456	96.82%	13	2.76%	0	0.00%
15	472	457	96.82%	11	2.33%	2	0.42%
16	483	454	94.00%	20	4.14%	1	0.21%
17	492	213	43.29%	259	52.64%	0	0.00%
18	494	439	88.87%	42	8.50%	5	1.01%
19	484	435	89.88%	38	7.85%	3	0.62%
20	493	451	91.48%	38	7.71%	2	0.41%
21	490	453	92.45%	34	6.94%	0	0.00%
Totals	10024	8570	85.49%	1173	11.70%	124	1.24%

FCPC Plan 1 - Voting Age Population (VAP)
(White, Native American and Black Only)

DISTRICT	Voting Age Pop (VAP)	White	% of VAP	Native Amer.	% of VAP	Black	% of VAP
1	396	392	98.99%	4	1.01%	0	0.00%
2	373	362	97.05%	5	1.34%	1	0.27%
3	417	403	96.64%	5	1.20%	0	0.00%
4	355	347	97.75%	3	0.85%	0	0.00%
5	381	293	76.90%	6	1.57%	72	18.90%
6	322	304	94.41%	14	4.35%	3	0.93%
7	288	163	56.60%	122	42.36%	0	0.00%
8	363	335	92.29%	17	4.68%	0	0.00%
9	364	355	97.53%	6	1.65%	0	0.00%
10	364	357	98.08%	5	1.37%	0	0.00%
11	368	359	97.55%	1	0.27%	2	0.54%
12	389	379	97.43%	9	2.31%	0	0.00%
13	273	66	24.18%	205	75.09%	0	0.00%
14	335	328	97.91%	7	2.09%	0	0.00%
15	351	344	98.01%	5	1.42%	1	0.28%
16	404	388	96.04%	12	2.97%	0	0.00%
17	306	146	47.71%	151	49.35%	0	0.00%
18	346	321	92.77%	21	6.07%	2	0.58%
19	355	329	92.68%	22	6.20%	0	0.00%
20	370	341	92.16%	25	6.76%	2	0.54%
21	368	350	95.11%	17	4.62%	0	0.00%
Totals	7488	6662	88.97%	662	8.84%	83	1.11%

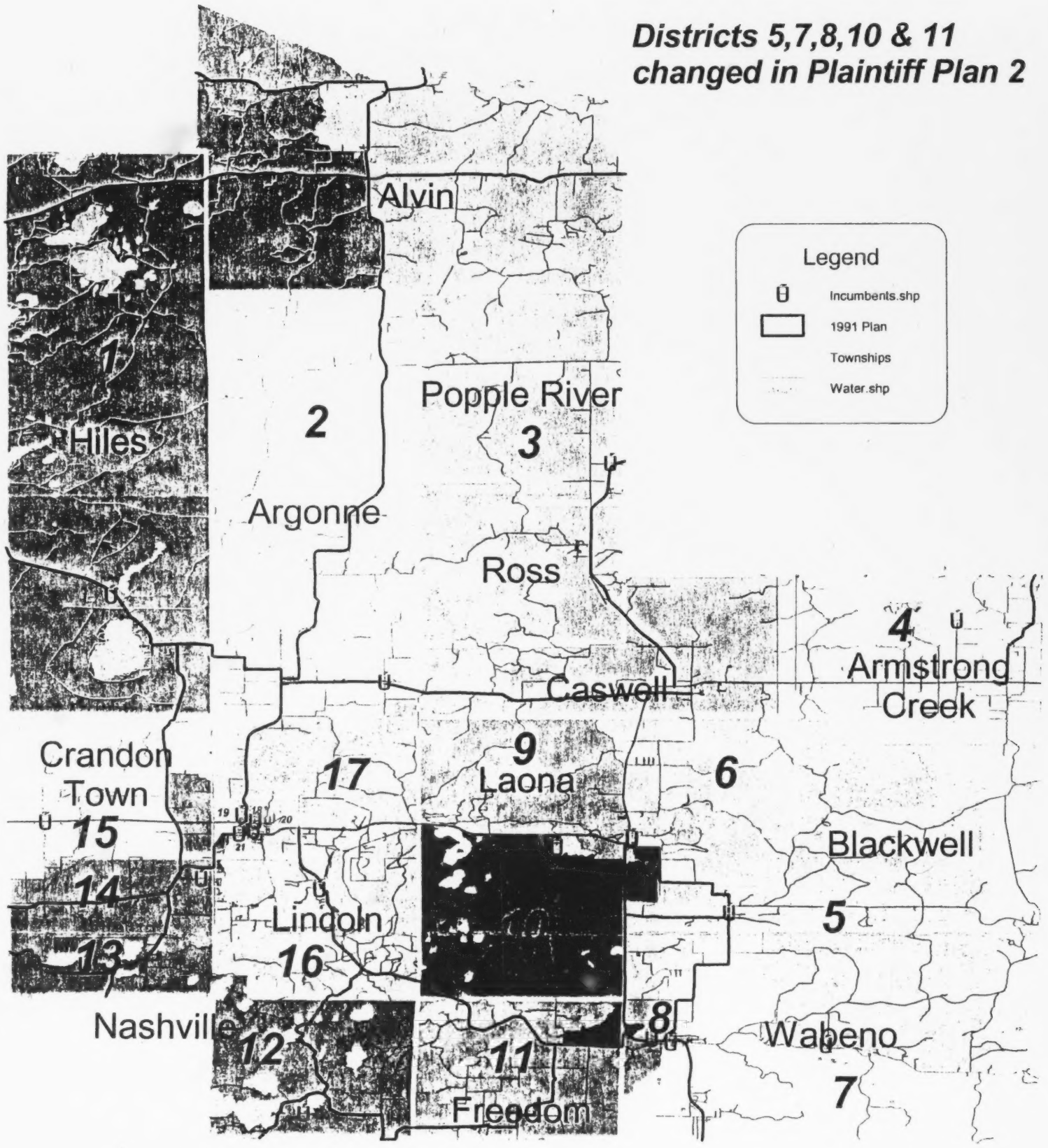
Plaintiff Plan 2

Within PlanTentative

Forest County, Wisconsin

Exhibit C
FCPC
Plan 2

Districts 5,7,8,10 & 11 changed in Plaintiff Plan 2



Note: Shape file provided by Plaintiffs was mistakenly labeled plan 3

Produced by

Election Data Services

BEST AVAILABLE COPY

FCPC Plan 2 - Summary of Deviation from Ideal Size

DISTRICT	Total Population	Ideal Size	Deviation	Raw Dev.
1	447	477	-6.36%	-30
2	514	477	7.76%	37
3	491	477	2.86%	14
4	463	477	-3.00%	-14
5	497	477	4.12%	20
6	459	477	-3.84%	-18
7	470	477	-1.54%	-7
8	495	477	3.70%	18
9	481	477	0.77%	4
10	484	477	1.40%	7
11	472	477	-1.12%	-5
12	428	477	-10.27%	-49
13	448	477	-6.15%	-29
14	471	477	-1.33%	-6
15	472	477	-1.12%	-5
16	483	477	1.19%	6
17	492	477	3.07%	15
18	494	477	3.49%	17
19	484	477	1.40%	7
20	493	477	3.28%	16
21	490	477	2.65%	13
Highest	514	477	7.76%	37
Lowest	428	477	-10.27%	-49
Overall Range	86	477	18.03%	86
Average			3.35%	16.0

FCPC Plan 2 - Total Population
(White, Native American and Black Only)

DISTRICT	Total Pop.	White	% of Total	Native Amer.	% of Total	Black	% of Total
1	447	435	97.32%	12	2.68%	0	0.00%
2	514	495	96.30%	8	1.56%	1	0.19%
3	491	469	95.52%	6	1.22%	3	0.61%
4	463	448	96.76%	3	0.65%	0	0.00%
5	497	382	76.86%	7	1.41%	96	19.32%
6	459	427	93.03%	21	4.58%	7	1.53%
7	470	221	47.02%	242	51.49%	0	0.00%
8	495	428	86.46%	31	6.26%	4	0.81%
9	481	466	96.88%	12	2.49%	0	0.00%
10	484	468	96.69%	14	2.89%	0	0.00%
11	472	464	98.31%	3	0.64%	0	0.00%
12	428	416	97.20%	11	2.57%	0	0.00%
13	448	97	21.65%	348	77.68%	0	0.00%
14	471	456	96.82%	13	2.76%	0	0.00%
15	472	457	96.82%	11	2.33%	2	0.42%
16	483	454	94.00%	20	4.14%	1	0.21%
17	492	213	43.29%	259	52.64%	0	0.00%
18	494	439	88.87%	42	8.50%	5	1.01%
19	484	435	89.88%	38	7.85%	3	0.62%
20	493	451	91.48%	38	7.71%	2	0.41%
21	490	453	92.45%	34	6.94%	0	0.00%
Totals	10028	8574	85.50%	1173	11.70%	124	1.24%

FCPC Plan 2 - Voting Age Population (VAP)
(White, Native American and Black Only)

DISTRICT	Voting Age Pop (VAP)	White	% of VAP	Native Amer.	% of VAP	Black	% of VAP
1	396	392	98.99%	4	1.01%	0	0.00%
2	373	362	97.05%	5	1.34%	1	0.27%
3	417	403	96.64%	5	1.20%	0	0.00%
4	355	347	97.75%	3	0.85%	0	0.00%
5	394	306	77.66%	6	1.52%	72	18.27%
6	322	304	94.41%	14	4.35%	3	0.93%
7	288	163	56.60%	122	42.36%	0	0.00%
8	357	327	91.60%	15	4.20%	2	0.56%
9	364	355	97.53%	6	1.65%	0	0.00%
10	376	366	97.34%	8	2.13%	0	0.00%
11	353	349	98.87%	0	0.00%	0	0.00%
12	389	379	97.43%	9	2.31%	0	0.00%
13	273	66	24.18%	205	75.09%	0	0.00%
14	335	328	97.91%	7	2.09%	0	0.00%
15	351	344	98.01%	5	1.42%	1	0.28%
16	404	388	96.04%	12	2.97%	0	0.00%
17	306	146	47.71%	151	49.35%	0	0.00%
18	346	321	92.77%	21	6.07%	2	0.58%
19	355	329	92.68%	22	6.20%	0	0.00%
20	370	341	92.16%	25	6.76%	2	0.54%
21	368	350	95.11%	17	4.62%	0	0.00%
Totals	7492	6666	88.97%	662	8.84%	83	1.11%

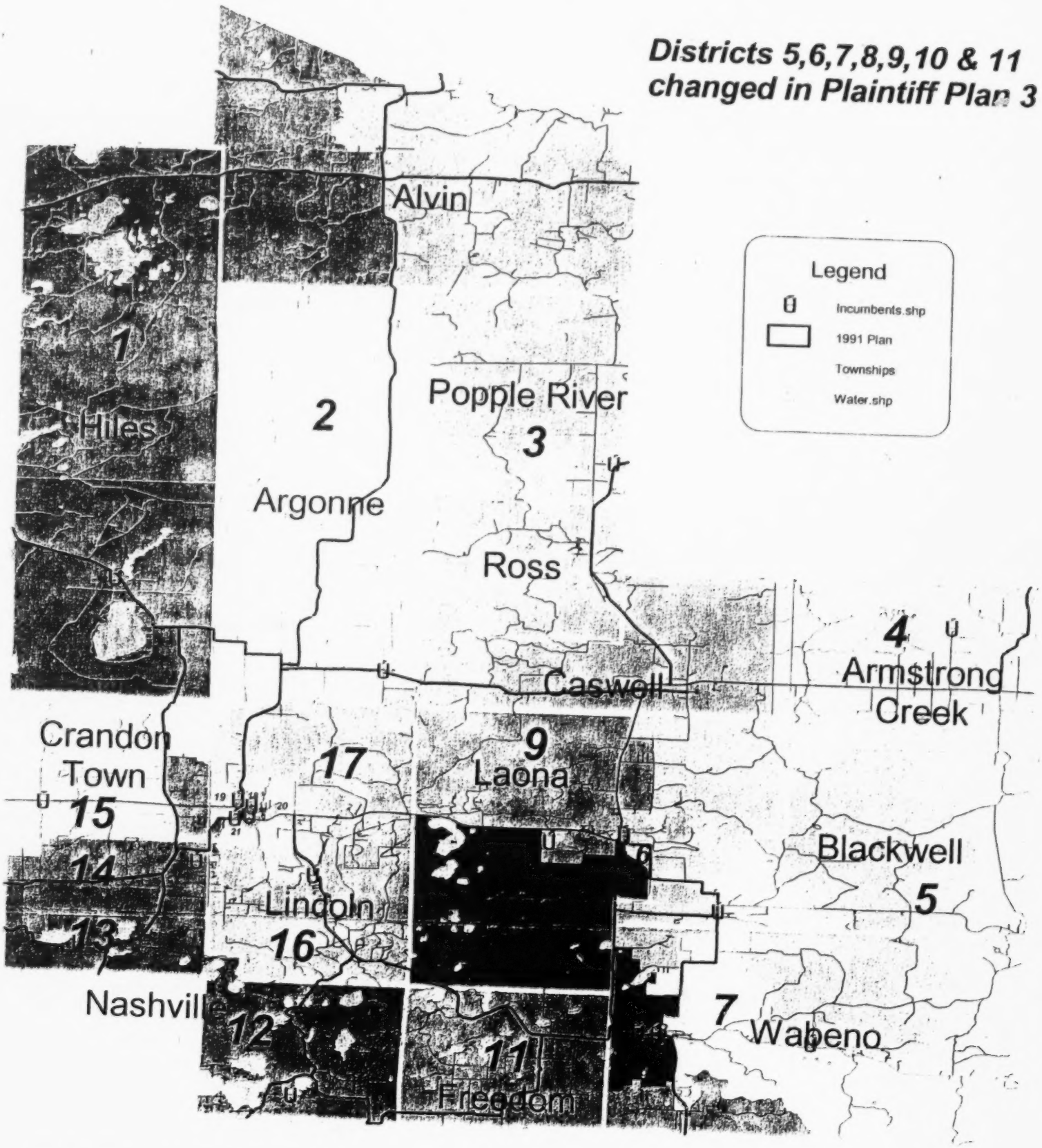
Plaintiff Plan 3

Within PlanTentative

Forest County, Wisconsin

Exhibit D
FCPC
Plan 3

Districts 5,6,7,8,9,10 & 11 changed in Plaintiff Plan 3



Note: Shape file provided by Plaintiffs was mistakenly labeled as plan 2

Produced by

Election Data Services

App. 46

FCPC Plan 3 - Summary of Deviation from Ideal Size

DISTRICT	Total Population	Ideal Size	Deviation	Raw Dev.
1	447	477	-6.36%	-30
2	514	477	7.76%	37
3	491	477	2.86%	14
4	463	477	-3.00%	-14
5	468	477	-1.96%	-9
6	483	477	1.19%	6
7	481	477	0.77%	4
8	473	477	-0.91%	-4
9	492	477	3.07%	15
10	486	477	1.82%	9
11	471	477	-1.33%	-6
12	428	477	-10.27%	-49
13	448	477	-6.15%	-29
14	471	477	-1.33%	-6
15	472	477	-1.12%	-5
16	483	477	1.19%	6
17	492	477	3.07%	15
18	494	477	3.49%	17
19	484	477	1.40%	7
20	493	477	3.28%	16
21	490	477	2.65%	13
Highest	514	477	7.76%	37
Lowest	428	477	-10.27%	-49
Overall Range	86	477	18.03%	86
Average			3.09%	14.8

FCPC Plan 3 - Total Population
(White, Native American and Black Only)

DISTRICT	Total Pop.	White	% of Total	Native Amer.	% of Total	Black	% of Total
1	447	435	97.32%	12	2.68%	0	0.00%
2	514	495	96.30%	8	1.56%	1	0.19%
3	491	469	95.52%	6	1.22%	3	0.61%
4	463	448	96.76%	3	0.65%	0	0.00%
5	468	446	95.30%	16	3.42%	2	0.43%
6	483	460	95.24%	14	2.90%	5	1.04%
7	481	135	28.07%	234	48.65%	96	19.96%
8	473	418	88.37%	29	6.13%	4	0.85%
9	492	470	95.53%	18	3.66%	0	0.00%
10	486	464	95.47%	11	2.26%	0	0.00%
11	471	459	97.45%	8	1.70%	0	0.00%
12	428	416	97.20%	11	2.57%	0	0.00%
13	448	97	21.65%	348	77.68%	0	0.00%
14	471	456	96.82%	13	2.76%	0	0.00%
15	472	457	96.82%	11	2.33%	2	0.42%
16	483	454	94.00%	20	4.14%	1	0.21%
17	492	213	43.29%	259	52.64%	0	0.00%
18	494	439	88.87%	42	8.50%	5	1.01%
19	484	435	89.88%	38	7.85%	3	0.62%
20	493	451	91.48%	38	7.71%	2	0.41%
21	490	453	92.45%	34	6.94%	0	0.00%
Totals	10024	8570	85.49%	1173	11.70%	124	1.24%

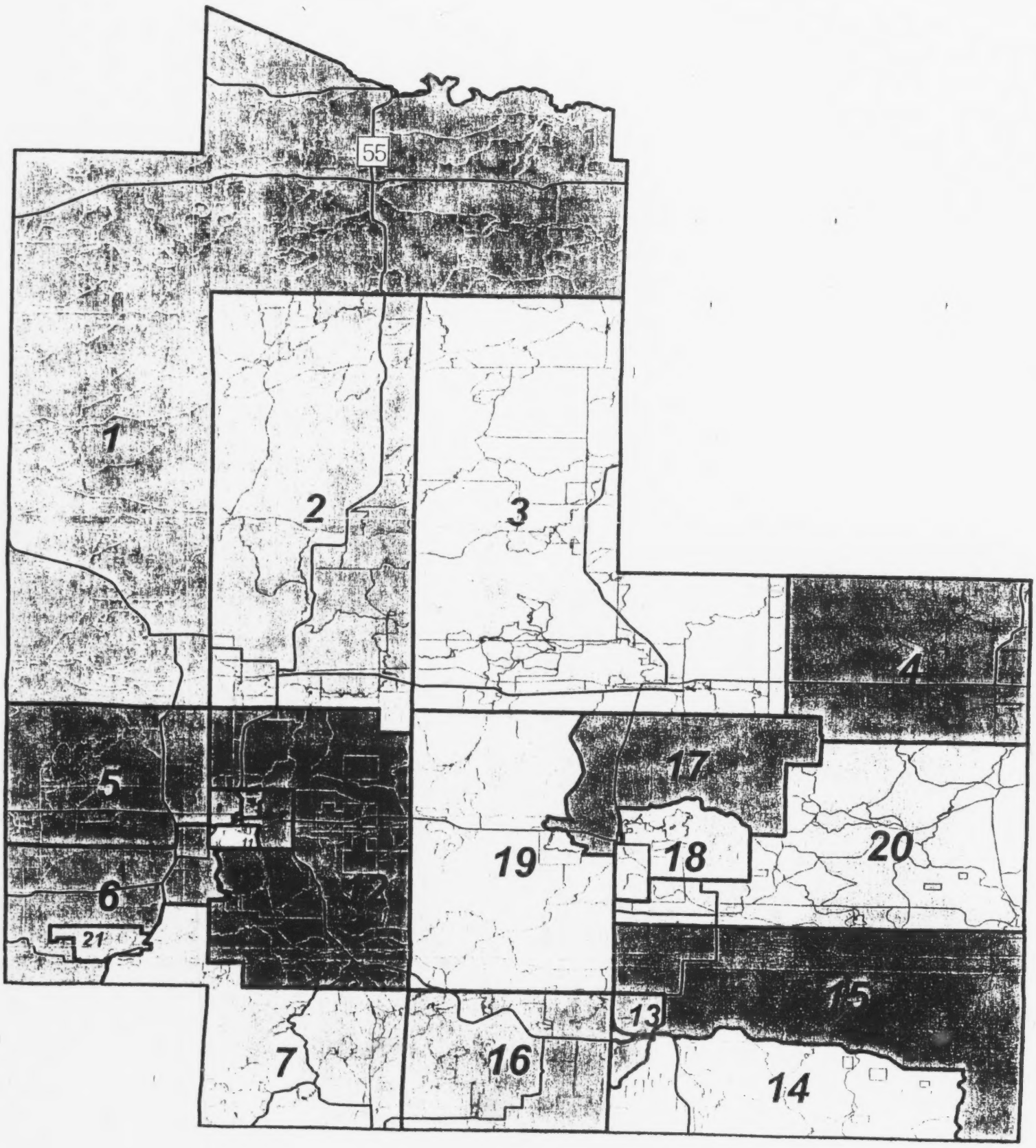
FCPC Plan 3 - Voting Age Population
(White, Native American and Black Only)

DISTRICT	Voting Age Pop (VAP)	White	% of VAP	Native Amer.	% of VAP	Black	% of VAP
1	396	392	98.99%	4	1.01%	0	0.00%
2	373	362	97.05%	5	1.34%	1	0.27%
3	417	403	96.64%	5	1.20%	0	0.00%
4	355	347	97.75%	3	0.85%	0	0.00%
5	363	348	95.87%	12	3.31%	1	0.28%
6	357	344	96.36%	9	2.52%	2	0.56%
7	297	97	32.66%	117	39.39%	72	24.24%
8	341	314	92.08%	15	4.40%	2	0.59%
9	366	353	96.45%	9	2.46%	0	0.00%
10	355	346	97.46%	5	1.41%	0	0.00%
11	371	364	98.11%	4	1.08%	0	0.00%
12	389	379	97.43%	9	2.31%	0	0.00%
13	273	66	24.18%	205	75.09%	0	0.00%
14	335	328	97.91%	7	2.09%	0	0.00%
15	351	344	98.01%	5	1.42%	1	0.28%
16	404	388	96.04%	12	2.97%	0	0.00%
17	306	146	47.71%	151	49.35%	0	0.00%
18	346	321	92.77%	21	6.07%	2	0.58%
19	355	329	92.68%	22	6.20%	0	0.00%
20	370	341	92.16%	25	6.76%	2	0.54%
21	368	350	95.11%	17	4.62%	0	0.00%
Totals	7488	6662	88.97%	662	8.84%	83	1.11%

1991 Plan

Forest County, WI

Exhibit E
1991
County Plan



Produced by:

Election Data Services

NOV 19 2003

No. 03-577

In The
Supreme Court of the United States

HAROLD FRANK AND FOREST COUNTY POTAWATOMI COMMUNITY OF WISCONSIN,

Petitioners,

v.

FOREST COUNTY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

CHARLES H. BOHL
Counsel of Record
NATHAN A. FISHBACH
ANDREW A. JONES
WHYTE HIRSCHBOECK DUDEK S.C.
555 East Wells Street
Suite 1900
Milwaukee, Wisconsin 53202
(414) 273-2100

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

A local redistricting plan with a maximum population deviation in excess of 10%, while presumptively unconstitutional under the one-person, one-vote guarantee of the Equal Protection Clause, may still survive challenge if it is justified by legitimate considerations incident to the effectuation of a rational state policy. The county supervisor redistricting plan adopted by Respondents in 2001, while it has a maximum population deviation of 18.3%, was correctly found both by the district court and the Seventh Circuit Court of Appeals to be justified by such considerations.

The district court and the Seventh Circuit also correctly found that Respondents' redistricting plan did violate § 2 of the Voting Rights Act. Petitioners now ask this Court to consider an issue under § 2 – namely, the appropriate measure of population data (i.e., total population, voting age population, or some other measure), that they did not press before the Seventh Circuit, an issue that does not save their vote dilution claim in any event.

Accordingly, the questions presented for review are as follows:

1. Whether the Seventh Circuit properly framed its analysis of Petitioners' equal protection claim under the 10% rule articulated by this Court in *Brown v. Thomson*, 462 U.S. 835 (1983), and, if so, whether Respondents' supervisor redistricting plan is justified by legitimate considerations incident to the effectuation of a rational state policy.

QUESTIONS PRESENTED FOR REVIEW – Continued

2. Whether the issue of the appropriate population measure for a § 2 claim is properly before this Court, and, if so, whether Petitioners' § 2 challenge to Respondents' supervisor redistricting plan must fail, regardless of whether total population, voting age population, or some other measure of population data is used to analyze their claim.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATUTE INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	6
A. The Seventh Circuit Did Not Abandon the 10% Rule of *Brown v. Thomson*, 462 U.S. 835 (1983), and Its Decision Is Not Otherwise in Conflict With *Brown* or Other Applicable Decisions of This Court	6
B. The Seventh Circuit Applied the Correct Level of Scrutiny to the Justifications Offered by Respondents for the Maximum Population Deviation of the 2001 County Plan, and the Reasons for the Deviation Are Sufficient to Satisfy One-Person, One-Vote Principles	10
1. The Seventh Circuit Applied the Correct Level of Scrutiny	10
2. Sufficient Justifications Exist for the Population Deviation of the 2001 County Plan	13
3. Conclusion	18
C. Petitioners' Current Argument Under § 2 of the Voting Rights Act Was Neither Presented to Nor Considered by the Seventh Circuit, and Petitioners' § 2 Claim Is Without Merit, Regardless of the Appropriate Measure of the Relevant Population Data	18

TABLE OF CONTENTS – Continued

Page

1. Petitioners' Current Argument Is Not Properly Before This Court 19
2. Petitioners' § 2 Claim Is Not an Appropriate Vehicle for Review of the Legal Issue Now Pressed by Petitioners..... 21
3. Conclusion..... 25

CONCLUSION 25

APPENDIX:

Wis. Stat. § 59.10(3) (2001-02).....R. App. 1

TABLE OF AUTHORITIES

Page

CASES

Abrahms v. Johnson, 521 U.S. 74 (1997) 13

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 20

African Am. Voting Rights Legal Defense Fund, Inc. v. Villa, 54 F.3d 1345 (8th Cir. 1995) 22

Anne Arundel Co. Republican Cent. Comm. v. State Admin. Bd. of Election Laws, 781 F. Supp. 394 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992) 16

Avery v. Midland County, Tex., 390 U.S. 474 (1968) 7

Barnett v. City of Chicago, 141 F.3d 699 (7th Cir. 1998) 22

Brewer v. Ham, 876 F.2d 448 (5th Cir. 1989) 22

Brown v. Thomson, 462 U.S. 835 (1983) ..... *passim*

Chapman v. Meier, 420 U.S. 1 (1975) 8

Chen v. City of Houston, 532 U.S. 1046 (2001) 18

Dunn v. Blumstein, 405 U.S. 330 (1972) 12

Evans v. Cornman, 398 U.S. 419 (1970) 12

F.C.C. v. Beach Communications, Inc., 508 U.S. 307 (1993) 12

Gaffney v. Cummings, 412 U.S. 735 (1973) 7

Georgia v. Ashcroft, 156 L. Ed. 2d 428 (2003) 18

Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000) 20

Growe v. Emison, 507 U.S. 25 (1993) 21

Holly Farms Corp. v. National Labor Relations Bd., 517 U.S. 392 (1996) 20

TABLE OF AUTHORITIES – Continued

Page

Johnson v. DeGrandy, 512 U.S. 997 (1994)..... 18, 22, 23, 24

Karcher v. Daggett, 462 U.S. 725 (1983), *aff'd*, 467 U.S. 1222 (1984)..... 12

Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985)..... 22

Mahan v. Howell, 410 U.S. 315, *modified on other grounds*, 411 U.S. 922 (1973)..... *passim*

Marylanders for Fair Representation, Inc. v. Schaefer, 849 F. Supp. 1072 (D. Md. 1994) 16

McDonald v. Bd. of Election Comm'rs, 394 U.S. 802 (1969)..... 12

Reynolds v. Sims, 377 U.S. 533 (1964) 6, 7, 11, 12

Sutton v. Dunne, 681 F.2d 484 (7th Cir. 1982) 13

Swann v. Adams, 385 U.S. 440 (1967) 11

Thornburg v. Gingles, 478 U.S. 30 (1986)..... 19, 21, 22, 24

Voinovich v. Quilter, 507 U.S. 146 (1993)..... 9, 11, 12

Wisconsin v. City of New York, 517 U.S. 1 (1996)..... 13

STATUTES

Wis. Stat. § 59.10 (2001-02)..... 1, 14

STATUTE INVOLVED

Wis. Stat. § 59.10 (2001-02). (*See* Respondents' Appendix for text.)

STATEMENT OF THE CASE

Forest County is a rural county, 1,014 square miles in size, located in northeastern Wisconsin. (App. at 13.) According to the 2000 Census, only 10,024 people live in Forest County. (*Id.* at 18.) Fifty-seven percent of the census blocks in Forest County are unpopulated, resulting in a population density in the county of only 9.9 persons per square mile. (*Id.* at 1 & 13.) In contrast, Milwaukee County, Wisconsin's most populated county, has a population density of 3,891.4 persons per square mile. (*Id.* at 13.)

The Forest County Board of Supervisors (the "County Board") is comprised of twenty-one members, each elected from a single-member district in non-partisan elections held every two years. (*Id.* at 1-2.) Pursuant to its duties under § 59.10(3)(b) of the Wisconsin Statutes, the County Board undertook in April 2001 to redraw the twenty-one supervisor districts based on the 2000 Census data. (*Id.* at 15.)

A committee of the County Board, comprised of eight elected supervisors, including one Native American, held three public meetings in May 2001 to initially consider the redistricting. At one such meeting, the committee took public comments on a draft redistricting plan submitted by an outside consultant retained by the County Board. Pursuant to § 59.10(3)(b)(1) of the Wisconsin Statutes, on May 29, 2001, the County Board adopted the draft plan as

the County's tentative redistricting plan (the "Tentative Plan"). (*Id.* at 16.)

Thereafter, the County Board forwarded the Tentative Plan to all of the municipalities in Forest County for comment. Several towns, including Alvin and Argonne, objected to the Tentative Plan, voicing a concern that they not be split among several supervisor districts. (Record ("R.") 45, Exs. 5 & 6.)

The redistricting committee discussed the concerns voiced by the towns of Alvin and Argonne, as well as those raised during the redistricting process by Petitioners, at a public meeting on August 14, 2001. (*Id.*, Ex. 7.) The redistricting committee approved the Tentative Plan for recommendation to the full County Board at this same meeting. (*Id.*) On August 21, 2001, the County Board approved the Tentative Plan as the final county supervisor districting plan (the "2001 County Plan") following a public hearing. (*Id.*)

Given Forest County's total population of 10,024, the ideal population of each of the 21 supervisor districts for one-person, one-vote purposes is 477. (*Id.* at 18.) Under the 2001 County Plan, the largest supervisor district is District 2 (located in the town of Argonne), which has a population of 514. The smallest is District 12 (in the town of Nashville), which has a population of 428. Thus, the 2001 County Plan has a maximum population deviation of 18.03%. (*Id.*) All told, the average population deviation of the twenty-one districts is only 3.59%. Setting aside Districts 2 and 12, the average deviation of the remaining nineteen districts is 3.01%. (*Id.* at 19 & 38.) None of the three redistricting plans presented by Petitioners below alter the maximum deviation of the 2001 County Plan. (*Id.* at 19.)

The redistricting plan adopted by Forest County in 1991 (the "1991 County Plan") contained one majority-minority

district in favor of Native Americans. This district (then District 21) was located in the town of Nashville. (*Id.* at 15.) The 2001 County Plan maintains this majority-minority Native American district in Nashville (now numbered District 13). Under the 2001 County Plan, the racial makeup of District 13 is as follows:

2001 County Plan – District 13

	Total	White	%	Native American	%
Total Population	448	97	21.65%	348	77.68%
Voting Age Population	273	66	24.18%	205	75.09%

(*Id.* at 19, 37, & 39.)

In addition, the 2001 County Plan creates a second district (District 17 in the town of Lincoln) in which Native Americans are within 1% of a majority of the voting age population. Under the 2001 County Plan, the racial makeup of District 17 is as follows:

2001 County Plan – District 17

	Total	White	%	Native American	%
Total Population	492	213	43.29%	259	52.64%
Voting Age Population	306	146	47.71%	151	49.35%

(*Id.*)

This aspect of the 2001 County Plan is consistent with demographic changes in Forest County between 1990 and 2000. In fact, between 1990 and 2000, some of the greatest increases in Forest County's population occurred in the town of Lincoln. (R. 43 at 16-18.) Significantly, some of the greatest increases in the county's Native American population between 1990 and 2000 also occurred in Lincoln. (R. 43 at 16-18.)

In pursuing their claims under § 2 of the Voting Rights Act, Petitioners have focused on the creation of a minority-majority district in favor of Native Americans in the town of Wabeno. Petitioners argue that the boundaries of District 7 should be altered to affect this change. (App. at 20.)

Under the 1991 County Plan, Wabeno consisted of three whole supervisor districts. (*Id.* at 37 & 49.) However, based on the 2000 Census, Wabeno's population is insufficient to support more than two full supervisor districts by itself. (*Id.* at 20; R. 43 at 40.)

Petitioners have offered three different redistricting plans as alternatives to the 2001 County Plan. One of these plans, Plan 1, was proposed by Petitioners during the redistricting process before the County Board. The other two, Plans 2 and 3, were not proposed by Petitioners until discovery was underway in this litigation. (App. at 17.) Before the Seventh Circuit, Petitioners focused exclusively on Plan 3, raising no arguments with respect to Plans 1 and 2. (*Id.* at 8.) Now, Petitioners return to Plans 1 and 2, abandoning Plan 3.

Under the 2001 County Plan, District 7 has the following racial make-up:

2001 County Plan – District 7 – Total Population

District	Total	White	% of Total	Native American	% of Total	Black	% of Total
7	488	274	56.15%	207	42.42%	0	0.00%

(*Id.* at 21 & 39.)

2001 County Plan – District 7 – Voting Age Population

District	Total	White	% of Total	Native American	% of Total	Black	% of Total
7	304	198	65.13%	103	33.88%	0	0.00%

(*Id.* at 39.)

Under Petitioners' Plans 1 and 2, District 7 would have the following racial make-up:

Petitioners' Plans 1 and 2 – District 7 – Total Population

District	Total	White	% of Total	Native American	% of Total	Black	% of Total
7	470	221	47.02%	242	51.49%	0	0.00%

(*Id.* at 21 & 42.)

Petitioners' Plans 1 and 2 – District 7 – Voting Age Population

District	Total	White	% of Total	Native American	% of Total	Black	% of Total
7	288	163	56.60%	122	42.36%	0	0.00%

(*Id.*)

REASONS FOR DENYING THE WRIT

A. The Seventh Circuit Did Not Abandon the 10% Rule of *Brown v. Thomson*, 462 U.S. 835 (1983), and Its Decision Is Not Otherwise in Conflict With *Brown* or Other Applicable Decisions of This Court.

Petitioners mischaracterize the holding of the Seventh Circuit with respect to their claim under the one-person, one-vote guarantee of the Equal Protection Clause. Specifically, the Seventh Circuit did not abandon the 10% rule established in *Brown v. Thomson*, 462 U.S. 835 (1983), and its decision is not otherwise in conflict with *Brown* or other decisions of this Court.

As this Court held in *Reynolds v. Sims*, the Equal Protection Clause requires that, in drawing state legislative districts, a state must make "an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable" so as to ensure that each person's vote is afforded equal weight in the election of representatives. 377 U.S. 533, 577 (1964). This "one-person, one-vote" guarantee also has been applied to local governmental

bodies in their districting efforts. *See, e.g., Avery v. Midland County, Tex.*, 390 U.S. 474, 478-79 (1968).

As this Court also acknowledged in *Reynolds*, however, some deviations from strict population equality among local legislative districts might be necessary to account for legitimate districting objectives such as maintaining the integrity of political subdivisions and ensuring compact districts of contiguous territory. *Reynolds*, 377 U.S. at 578-79. In *Gaffney v. Cummings*, this Court noted that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." 412 U.S. 735, 745 (1973). Quantifying the nature of such "minor deviations," this Court held in *Brown* that a local districting plan which provides for a maximum population deviation between the largest and smallest districts in the plan of less than 10% of the ideal population is *prima facie* constitutional under the one-person, one-vote standard. *Brown*, 462 U.S. at 843.

Even if a local redistricting plan has a maximum population deviation of 10% or greater, it may still comply with the Equal Protection Clause if it can be justified by the political subdivision in question. (*Id.*) As this Court reasoned in *Reynolds*, "[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-protection principles are constitutionally permissible." *Reynolds*, 377 U.S. at 579; *see also Mahan v. Howell*, 410 U.S. 315, 325, *modified on other grounds*, 411 U.S. 922 (1973); *Brown*, 462 U.S. at 843.

The Seventh Circuit expressly noted the *Brown* standard in upholding the judgment of the district court in favor of Respondents. (App. at 3-4.) Quoting the language of *Brown*, the Seventh Circuit described it, at once, as both a "safe harbor" and a "rule of prima facie liability." (*Id.* at 4.) Further, the Seventh Circuit expressly acknowledged this Court's admonition in *Chapman v. Meier*, 420 U.S. 1, 24-25 (1975), that sparse population, "without more, does not permit a substantial deviation from the average." (App. at 4.)

Far from abandoning the *Brown* standard, the Seventh Circuit only examined the difficulties in applying the standard in circumstances so far removed from the facts on which it was originally premised. (*Id.*) As the Seventh Circuit reasonably noted, the unusually small size of Forest County's population (even the legislative districts in *Chapman* were twenty-five times more populous than those at issue in the 2001 County Plan), coupled with the uneven distribution of the populace across the large area covered by the county's boundaries and the large number of supervisor districts, legitimately make it "harder to create districts of equal population without creating weird shapes that straddle the boundaries of the smaller governmental units." (*Id.*)

In the end, the extent and nature of the maximum population deviation presented by the 2001 County Plan (and, conspicuously, not corrected by Petitioners' Plans 1, 2, or 3) is only fairly examined against this backdrop. Indeed, given the population of Forest County and the number of supervisor districts, a population deviation of 5% results if a district is either over or under populated by only twenty-four persons, and a deviation of 10% (the limit of so-called *de minimus* deviations) results if a district is

over or under populated by only forty-eight persons. Further, the maximum population deviation of the 2001 County Plan exceeds the 10% mark by only thirty-eight people. (18.03% – 10% = 8.03%) (8.03% x 477 = 38). Finally, the 2001 County Plan exceeds the 16.4% deviation expressly approved by this Court in *Mahan v. Howell* by a mere eight people. (18.03% – 16.4% = 1.63%) (1.63% x 477 = 8). Without question, as the Seventh Circuit reasonably recognized, such information must inform a court's analysis of a redistricting plan and its maximum population deviation under one-person, one-vote principles, even if it, in and of itself, does not permit a departure from one-person, one-vote principles.

In full accord with *Brown*, *Mahan*, and other relevant decisions of this Court, the Seventh Circuit concluded its analysis by noting that "[a]t all events, even if intended to apply to the tiniest electoral districts, the 10 percent rule is merely one of prima facie liability, and is therefore rebuttable. . . ." (App. at 5.) (citing *Voinovich v. Quilter*, 507 U.S. 146, 161-62 (1993)). As is discussed below, the Seventh Circuit then went on to examine the 2001 County Plan to determine whether Respondents had rebutted this presumption in light of the 18.03% deviation presented by the 2001 County Plan. (App. at 5-7.)

For these reasons, a full review of the Seventh Circuit's reasoning in upholding the judgment in favor of Respondents on Petitioners' equal protection claim reveals that the Seventh Circuit did not "discard" or "reject" the 10 percent rule of *Brown*. Far from presenting a conflict with prior decisions of this Court, the Seventh Circuit's holding represents a fair, reasoned application of this precedent. As a result, Petitioners' arguments fail to offer a basis for this Court to issue the requested writ of certiorari.

B. The Seventh Circuit Applied the Correct Level of Scrutiny to the Justifications Offered by Respondents for the Maximum Population Deviation of the 2001 County Plan, and the Reasons for the Deviation Are Sufficient to Satisfy One-Person, One-Vote Principles.

Applying the standard set forth in *Brown v. Thomson* with respect to Petitioners' one-person, one-vote challenge under the Equal Protection Clause, the Seventh Circuit applied the correct level of scrutiny to the justifications offered by Respondents for the population deviation of the 2001 County Plan. Further, contrary to the suggestion of Petitioners, Respondents presented a constitutionally sufficient record of the reasons for the population deviation. Both legally and factually, this case presents no reason for this Court to clarify prior precedent on these points.

1. The Seventh Circuit Applied the Correct Level of Scrutiny.

Petitioners argue that the Seventh Circuit applied the wrong level of scrutiny to the justifications offered by Respondents for the maximum population deviation of the 2001 County Plan. A review of applicable precedent reveals this concern to be unfounded.

In *Mahan v. Howell*, this Court was confronted with an equal protection challenge to a statute reapportioning the Virginia state legislature. 410 U.S. at 317. Under the statute in question, the reapportionment of the Virginia House of Delegates resulted in a districting plan that entailed a maximum population deviation of 16.4%. Yet, with one exception, this Court noted, the district lines

contemplated under the reapportionment plan followed the boundaries of local political jurisdictions such as counties and cities. (*Id.* at 319.) Agreeing that a policy of adhering to local political jurisdictional lines in drawing legislative districts was rational, this Court concluded that the redistricting plan reasonably advanced such a policy. (*Id.* at 325-28.) According to this Court, the relevant inquiry was whether the state policy offered to justify the maximum population deviation was in fact furthered by the reapportionment plan. (*Id.* at 326.) Contrary to the argument of Petitioners, nothing in the *Mahan* decision suggests that this Court determined that a justification for a districting plan, evidencing a rational state policy furthered by the plan, must be shown to match the actual intent of the legislators in adopting the plan.

Subsequent decisions of the Supreme Court also do not support the analysis suggested by Petitioners. For instance, in *Brown v. Thomson*, this Court, quoting *Mahan*, noted that "[t]he ultimate inquiry, therefore, is whether the legislature's plan 'may reasonably be said to advance [a] rational state policy.'" *Brown*, 462 U.S. at 843. In *Voinovich v. Quilter*, the Court relied on the exact same formulation of the standard, citing both *Brown* and *Mahan*. *Voinovich*, 507 U.S. at 161. *See also Swann v. Adams*, 385 U.S. 440, 444 (1967) (describing the applicable burden of proof as requiring the districting entity to offer "a satisfactory explanation grounded on acceptable state policy"). Although Petitioners argue that the language of *Reynolds* counsels in favor of a standard that requires proof of the actual reasons underlying the adoption of the redistricting plan in question, the *Reynolds* Court seemingly did not face this precise question in the appeal before it. This fact, coupled with the subsequent readings of

Reynolds offered by the Supreme Court in cases such as *Mahan, Brown*, and *Voinovich*, leaves Petitioners' position without solid support.

The other cases assembled by Petitioners do not establish that the language of the *Mahan* decision is to be interpreted differently than it was by the Seventh Circuit or the district court in this case. Indeed, read properly, the portions of this Court's decision in *Karcher v. Daggett*, 462 U.S. 725, 740-41 (1983), *aff'd*, 467 U.S. 1222 (1984), a congressional redistricting case, quoted by Petitioners, speak only of the need for the districting entity to show that the plan in question actually advances the legitimate state objective offered as a justification for the population deviation of the plan. In addition, *Evans v. Cornman*, 398 U.S. 419 (1970), and *Dunn v. Blumstein*, 405 U.S. 330 (1972), both involved state restrictions on the right to vote and, thus, do not offer direct insight into the standard applicable in this context.

Not insignificantly, however, the analysis followed by the Seventh Circuit (and the district court, for that matter) finds ample support in the well-established framework of rational basis review utilized in analyzing other equal protection claims. *See, e.g., F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (observing that "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature"); *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969) (noting that "[l]egislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them").

In addition, the context supplied by the Seventh Circuit for its analysis – by referencing questions regarding inherent inaccuracies in census figures, population shifts over time, and the number of districts subject to the redistricting, finds support in relevant case law of this Court and the federal circuit courts. *See, e.g., Wisconsin v. City of New York*, 517 U.S. 1, 6-7 (1996); *Abrahms v. Johnson*, 521 U.S. 74, 100-01 (1997); *Sutton v. Dunne*, 681 F.2d 484, 487 (7th Cir. 1982).

2. Sufficient Justifications Exist for the Population Deviation of the 2001 County Plan.

With these principles in mind, the Seventh Circuit properly found that Respondents sufficiently justified the maximum population deviation of the 2001 County Plan. In addition, as both the Seventh Circuit and the district court noted, Petitioners' Plans 1, 2, and 3 do not alter the boundaries of the most and least populous districts in the 2001 County Plan (Districts 2 and 12) and, thus, do not decrease the maximum population deviation they challenge as unconstitutional. (App. at 8 & 19.)[1]

Applicable precedent establishes that the preservation of local political subdivisions is a legitimate policy goal in a redistricting effort. For instance, in *Mahan v. Howell*, this Court agreed that the policy of adhering to local

[1] An additional alternative offered by Petitioners for the first time at trial before the district court was presented without a map to indicate its boundaries and thus rejected by the Seventh Circuit. (App. at 8.)

political jurisdictional lines in drawing legislative districts was rational, and the Court upheld the plan in question after concluding that it reasonably advanced such a policy. 410 U.S. at 325-30. Likewise, in *Brown v. Thomson*, this Court observed that Wyoming's policy of strictly adhering to county boundaries in drawing legislative districts was without question "supported by substantial and legitimate state concerns." *Brown*, 462 U.S. at 843-44. In Wisconsin, a county must adhere as closely as possible to municipal boundaries in drawing supervisor district boundaries. *See* Wis. Stat. § 59.10(3)(b)(1) (2001-02) (requiring that "[i]n the tentative [districting] plan, the board shall, whenever possible, place whole contiguous . . . parts of the same municipality within the same district").

With this legal context in mind, it is clear that the goal of maintaining municipal boundaries was an integral part of Respondents' efforts to redraw the supervisor districts following the 2000 Census. Indeed, the 1991 County Plan followed the boundaries of the various townships within Forest County almost without exception.[2] While certain larger townships such as Wabeno or Laona were necessarily split into two or more districts, the boundaries of supervisor districts under the 1991 County Plan did not cross town lines except in very limited instances. (App. at 49.)

Respondents carried this respect for town boundaries forward in the 2001 County Plan. (*Id.* at 37.) As Dr. Ronald

[2] The boundaries of the fourteen townships and the one city in Forest County are marked in the map key for the 2001 County Plan. (App. at 37.)

Weber, one of Respondents' expert witnesses, noted, and as the district court acknowledged, each of these township splits was necessary to advance equal protection principles of population equality among the districts. (*Id.* at 27-28.) Working within the limitations mandated by the one-person, one-vote guarantee, however, the 2001 County Plan, on its face, otherwise follows the state legislative mandate of adhering to township boundaries in drawing supervisor districts. In addition, aside from 2001 County Plan itself, the record contains other evidence illustrating that maintaining the integrity of local boundaries was an integral part of the public debate that occurred during the County Board meetings regarding the redistricting plan. (R. 45, Exs. 4-7 & 9.)

As is noted above, the maximum population deviation of the 2001 County Plan can be traced directly to the populations of two districts – Districts 2 and 12. Indeed, the average population deviation for all twenty-one of the districts is 3.59%, and, setting aside Districts 2 and 12, the average deviation of the remaining nineteen districts is 3.01%. (App. at 19 & 38.) In drawing the boundaries of Districts 2 and 12, Forest County faced other concerns, not the least of which was the need to maintain Native American influence in Districts 13 and 17, which also justify the resulting deviations from the ideal population.

District 2 encompasses the entire town of Argonne, with the exception of one small area in the southeastern corner of the town. Under the 2001 County Plan, this one portion of the town is included in District 17, the district immediately to the south of Argonne. (*Id.* at 37.) This reflected a change from the 1991 County Plan, which included all of Argonne in one district. (*Id.* at 49.) Forest County might have moved additional census blocks from

the bottom portion of Argonne into District 17 in an effort to reduce the population of District 2 even more, but this would have increased the total population of District 17, pushing its deviation from the ideal even higher than the present figure of 3.07%, and would have lowered the number of Native Americans in District 17 as a percentage of the population from its present mark of 49.35% of the voting age population. (*Id.* at 37-38.) Thus, such a shift in census blocks would only have decreased the influence of Native Americans in District 17, a result that a number of federal district courts have found to not be required under applicable case law. *See, e.g.*, *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1072, 1075 (D. Md. 1994); *Anne Arundel Co. Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 398 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992). Moreover, Petitioners explicitly demanded during the redistricting process before the County Board that the County *not* adjust the boundaries of District 17 in any way that would have affected the racial make-up of the district, threatening suit if Forest County did not heed their demands. (R. 45, Ex. 8.)

Other factors, such as a large number of unpopulated census blocks, avoiding additional township splits between districts, and maintaining communities of interest based on existing school district, fire, and emergency medical service boundaries, likewise counseled strongly against shifting additional census blocks from District 2 to District 1 (encompassing Hiles and part of Alvin) or to District 3 (made up by the towns of Caswell, Ross, Popple River, and a portion of Alvin). (App. at 37; R. 43 at 23; R. 50, Ex. A; R. 47, Exs. A & B.)

The district with the smallest population under the 2001 County Plan is District 12 in the town of Nashville. Any effort to draw additional population from the neighboring townships of Lincoln (District 16) or Freedom (District 11) would have resulted in an additional split in town boundaries. (App. at 37.) District 12 is also bordered in part by District 13, a district that is populated primarily by Native Americans. Thus, any effort to draw people from this district to add to the population in District 12 would only have diluted the Native American influence in District 13. (R. 44 at 13; R. 45 at 23-24.) Finally, District 12 is bordered in small part by District 14, another Nashville district. Yet, any shift of people from District 14 to compensate for the under population of District 12 would have reduced the population of District 14 (which is already below the ideal population in the 2001 County Plan), triggering a domino effect requiring shifts of population from District 15 in the city of Crandon or District 16 in the town of Lincoln. (*Id.*) As is noted above, the 2001 County Plan, insofar as it did not provide for any of these results, is founded in legitimate districting principles and is not condemned by the one-person, one-vote rule.[3]

[3] Petitioners only selectively quote from the testimony of the outside consultant retained by the County Board to assist in its redistricting efforts. Indeed, according to the sworn testimony of Mr. Faust, the subject of reducing the maximum population deviation of the redistricting plan was central to the County Board's actions. (R. 64, Ex. C at 85-86.)

3. Conclusion.

Petitioners' suggestion that the Seventh Circuit's holding undermines established one-person, one-vote principles is unfounded, both legally and factually. Petitioners, again, have failed to provide a sufficient basis for this Court to grant the requested writ of certiorari.

C. Petitioners' Current Argument Under § 2 of the Voting Rights Act Was Neither Presented to Nor Considered by the Seventh Circuit, and Petitioners' § 2 Claim Is Without Merit, Regardless of the Appropriate Measure of the Relevant Population Data.

Petitioners ask this Court to grant certiorari so that it may address the issue of whether total population, voting age population, or another population measure is the proper basis upon which to judge a claim under § 2 of the Voting Rights Act. This question was noted but not resolved in this Court's decision in *Johnson v. DeGrandy*, 512 U.S. 997 (1994).[4] However, in raising this issue, Petitioners ask the Court to address a question that the Seventh Circuit did not consider. In any event, the full record demonstrates that Petitioners' § 2 claim does not provide an appropriate vehicle for the resolution of this issue, as their claim does not satisfy the three preconditions

[4] The question presented on petition for a writ of certiorari in *Chen v. City of Houston*, 532 U.S. 1046 (2001), a case cited by Petitioners, involved the one-person, one-vote doctrine of the Equal Protection Clause, not § 2 of the Voting Rights Act. Likewise, this Court's recent decision in *Georgia v. Ashcroft*, 156 L. Ed. 2d 428 (2003), involved preclearance under § 5 of the Voting Rights Act, not § 2.

identified in *Thornburg v. Gingles*, 478 U.S. 30 (1986), or the totality of the circumstances test as a whole, regardless of the population measure used to analyze their claim.

1. Petitioners' Current Argument Is Not Properly Before This Court.

Before the district court, Petitioners presented three redistricting plans, Plans 1, 2, and 3, each focusing on the creation of a new Native American majority district in one supervisor district (District 7 in the town of Wabeno). (App. at 17 & 32.) Before the district court, Petitioners argued that total population figures should be used as the measure of whether their plans met the first of the three *Gingles* preconditions, arguing that the yet-unaccepted theory of "virtual representation" justified the inclusion of those not of voting age to assess their plans. (*Id.* at 32.) The district court rejected this argument, relying on Seventh Circuit precedent to apply voting age population figures as the appropriate measure. (*Id.* at 32-33.) Using voting age population figures, the district court rejected Petitioners' Plans 1 and 2 under the first *Gingles* precondition, as neither plan includes sufficient numbers of Native Americans of voting age to constitute even a simple majority in the proposed district. The district court also rejected Petitioners' Plan 3 – a plan that proposes a majority-minority district based on a "coalition" of Native American and African American voters – under the second *Gingles* precondition on the ground that Petitioners had failed to prove sufficient political cohesion. (*Id.* at 34-35.)

On appeal to the Seventh Circuit, Petitioners dropped any reference to Plans 1 and 2 altogether. Instead, Petitioners relied entirely on their minority coalition proposal,

Plan 3. (*Id.* at 8.) Further, in advancing their case with respect to Plan 3, Petitioners expressly avoided any argument that total population figures should be used to measure the plan, observing in a footnote in their principal brief that they were "not actively asking the [Seventh Circuit] to review this portion of the district court's decision at this time" but that they would request that this Court consider the issue were a writ of certiorari to be granted. Addressing Petitioners' Plan 3, the Seventh Circuit found that Petitioners had failed to prove any political cohesion between the Native Americans and African Americans residing within the proposed district, echoing the analysis of the district court. (*Id.* at 9-10.) Not surprisingly, given Petitioners' posture on appeal, the Seventh Circuit did not consider the issue of whether total population figures might be the proper basis for an analysis under § 2.

Having failed to rely on Plans 1 and 2, and having failed to argue that total population, and not voting age population, figures should be used to measure their plans under § 2 before the Seventh Circuit, Petitioners should not be permitted to pursue such an argument before this Court. As this Court recognized in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *See also Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 n.7 (2000) (noting that the Supreme Court does not generally address arguments that were not the basis for the decision below); *Holly Farms Corp. v. National Labor Relations Bd.*, 517 U.S. 392, 400 (1996) (same).

2. Petitioners' § 2 Claim Is Not an Appropriate Vehicle for Review of the Legal Issue Now Pressed by Petitioners.

In any event, petitioners' § 2 claim is not an appropriate vehicle for this Court to address the legal issue now framed by Petitioners in their petition for certiorari, as the record establishes that Petitioners' Plans 1 and 2 (the plans they now rely on) do not satisfy either the three *Gingles* preconditions or the totality of the circumstances test applicable to all § 2 claims.

To establish a vote dilution claim under § 2 of the Voting Rights Act, a protected minority group initially must prove the existence of three threshold conditions. *Gingles*, 478 U.S. at 50-51; *Growe v. Emison*, 507 U.S. 25, 39-41 (1993). First, the minority group must establish that it is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. Second, the minority group must prove that it is politically cohesive. (*Id.* at 51.) Finally, the minority group must show that the white majority "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." (*Id.*) Each of these conditions is a necessary element of any successful claim under § 2. *Emison*, 507 U.S. at 40-41 ("[u]nless these points are established, there neither has been a wrong nor can there be a remedy").

Petitioners' Plans 1 and 2 do not include Native Americans in the proposed district (District 7) in numbers sufficient to satisfy the first *Gingles* precondition. In both plans, District 7 would contain 242 Native Americans, or 51.49% of the total district population of 470. (App. at 42.) With such a bare majority of the total population, it cannot be said that Native Americans in the proposed district

would in fact be in a position to elect a candidate of their choice. *See, e.g., DeGrandy*, 512 U.S. at 1008 (noting that the first *Gingles* precondition requires "the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its [own] choice"). As a number of federal circuit courts have noted, minority districts must include substantially more of the minority in question than a bare majority of the total population if the minority is to be in a position to elect a candidate of its choice. *See, e.g., Barnett v. City of Chicago*, 141 F.3d 699, 702-03 (7th Cir. 1998); *African Am. Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345, 1348 (8th Cir. 1995); *Brewer v. Ham*, 876 F.2d 448, 451-53 (5th Cir. 1989); *Ketchum v. Byrne*, 740 F.2d 1398, 1413-16 (7th Cir. 1984). Thus, even if total population figures are the proper measure, Petitioners cannot meet the first *Gingles* precondition (at least not without forcing this Court to find that a bare majority of total population figures represents a majority sufficient to elect a minority candidate of choice).

Even assuming that Petitioners can satisfy the first *Gingles* precondition with respect to their Plans 1 and 2, Petitioners nonetheless fail to meet either the second or third *Gingles* preconditions. In particular, the evidence of record establishes that Petitioners have not shown that Native Americans in Forest County are sufficiently politically cohesive to satisfy the second *Gingles* precondition. (R. 44 at 18-20.) Likewise, Petitioners have not shown that white voters in Forest County engage in block voting based on race, proof that is required to satisfy the third *Gingles* precondition. (*Id.*)

Moreover, proof of the three *Gingles* preconditions alone is not sufficient to establish a § 2 claim. *DeGrandy*,

512 U.S. at 1011. This is true, according to the *DeGrandy* Court, because "the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." (*Id.*) As a result, once a § 2 plaintiff establishes the three *Gingles* preconditions, the reviewing court must consider whether, based on the totality of the circumstances, minorities have been denied an equal opportunity to participate in the political process and to elect representatives of their choice. (*Id.*) As is well established, this review of the totality of the circumstances is governed by nine factors set forth in a U.S. Senate report included in the legislative history underlying § 2. *Gingles*, 478 U.S. at 44-45.

Evidence showing that the percentage of election districts in which the plaintiff minority group has an effective majority is equal to that group's percentage of the relevant population is an important consideration in such an analysis of the "totality of the circumstances." Although the *DeGrandy* Court cautioned that such "proportionality" is not dispositive of a § 2 claim, the Court simultaneously observed that the existence of proportionality is "obviously an indication that minority voters have an equal opportunity, in spite of racial polarization, 'to participate in the political process and to elect representatives of their choice.'" 512 U.S. at 1020. Importantly, the *DeGrandy* Court also noted that § 2 does not require that a political subdivision create additional majority-minority districts simply because the minority population is so dispersed within the relevant geographic area to permit such districts. As this Court reasoned in *DeGrandy*:

> reading § 2 to define [minority vote] dilution as any failure to maximize [the number of majority-minority districts] tends to obscure the very object of the statute and to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast.

(*Id.* at 1016-17.)

Here, Petitioners offered no specific proof before the district court under the framework of the nine factors in the Senate report, making only passing reference to the totality of the circumstances test. Absent such proof, however, their claim under § 2 cannot succeed, regardless of whether or not they meet the three *Gingles* preconditions, and regardless of whether total population or voting age population figures are used as the measure of their claim.

Finally, the record reflects that the 2001 County Plan already achieves proportionality as referenced by this Court in *DeGrandy* under the theory advanced by Petitioners. Indeed, Native Americans represent 11.70% of the total population of Forest County according to the 2000 Census (1173 of 10,024). (App. at 39.) As such, strict proportionality using total population figures would dictate that Native Americans be afforded two majority districts out of the twenty-one total supervisor districts (11.70% x 21 = 2.46). District 13 in the 2001 County Plan is a Native American majority district under any measure, as it is 77.68% Native American using total population figures. (*Id.*) In addition, assuming that a bare majority of total population is sufficient to create a minority-majority district (as Petitioners do in advancing their Plans 1 and

2), District 17 is also a Native American majority district, as it is 52.64% Native American using total population figures. (*Id.*) Accordingly, with two Native American districts (under Petitioners' theory), the 2001 County Plan achieves proportionality.

3. Conclusion.

Based on the foregoing, it is clear that this case is not an appropriate vehicle for this Court to consider the issue now raised by Petitioners, both because Petitioners' argument is one that is not properly before this Court and because Petitioners' claim under § 2 cannot be sustained regardless of whether total population or voting age population figures are the proper measure of a § 2 claim.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES H. BOHL
Counsel of Record
NATHAN A. FISHBACH
ANDREW A. JONES
WHYTE HIRSCHBOECK DUDEK S.C.
555 East Wells Street, Suite 1900
Milwaukee, Wisconsin 53202
(414) 273-2100

Counsel for Respondents

Wis. Stat, § 59.10 (2001-02):

59.10 Boards: composition; election; terms; compensation; compatibility. The boards of the several counties shall be composed of representatives from within the county who are elected and compensated as provided in this section. Each board shall act under sub. (2), (3) or (5), unless the board enacts an ordinance, by a majority vote of the entire membership, to act under sub. (1). If a board enacts such ordinance, a certified copy shall be filed with the secretary of state.

(1) SELF-ORGANIZED COUNTIES. (a) *Number of supervisors and apportionment of supervisory districts.* In each county with a population of at least 500,000, sub. (2) (a) and (b) applies. In counties with a population of less than 500,000 and more than one town, sub. (3) (a) to (c) applies. In counties with one town only, sub. (5) applies.

(b) *Terms.* The term of office of supervisors is 2 years. A board may determine whether the terms shall be concurrent or staggered. Supervisors shall be elected at the election to be held on the first Tuesday in April next preceding the expiration of their respective terms and shall take office on the 3rd Tuesday in April following their election. If the board determines that supervisors shall serve staggered terms, the board shall, by ordinance, provide for a division of supervisors into 2 classes, one class to be elected for one-half of a full term and the other class for a full term and thereafter the supervisors shall be elected for a full term. The board shall publish the ordinance as a class I notice, under ch. 985, before publication of the notice of the election at which supervisors are to be elected.

(c) *Compensation.* The method of compensation for supervisors shall be determined by the board.

(d) *Vacancies.* A board may determine the procedure for filling a vacancy.

(2) MILWAUKEE COUNTY. In each county with a population of at least 500,000:

(a) *Composition; supervisory districts.* Within 60 days after the population count by block, established in the decennial federal census of population, and maps showing the location and numbering of census blocks become available in printed form from the federal government or are published for distribution by an agency of this state, but no later than July 1 following the year of each decennial census, the board shall adopt and transmit to the governing body of each city and village wholly or partially contained within the county a tentative county supervisory district plan to be considered by the cities and villages when dividing into wards. The plan shall specify the number of supervisors to be elected and shall divide the county into a number of districts equal to the number of supervisors, with each district substantially equal in population and consisting of contiguous whole wards. Except as otherwise provided in this paragraph, the board shall develop and adopt the tentative plan in accordance with sub. (3) (b) 1. The board shall adopt a final plan by enacting an ordinance in accordance with sub. (3) (b) 2. to 4.

(b) *Election; term.* Supervisors shall be elected for 4-year terms at the election to be held on the first Tuesday in April next preceding the expiration of their respective terms, and shall take office on the 3rd Monday in April following their election.

(c) *Compensation.* Each supervisor shall be paid by the county an annual salary set by the board. The board may provide additional compensation for the chairperson. Section 66.0505 applies to this paragraph.

(3) OTHER COUNTIES. (a) *Classification; maximum number of supervisors.* Counties with a population of less than 500,000 and more than one town are classified and entitled to a maximum number of supervisors as follows:

1. Counties with a population of less than 500,000 but at least 100,000 shall have no more than 47 supervisors.

2. Counties with a population of less than 100,000 but at least 50,000 shall have no more than 39 supervisors.

3. Counties with a population of less than 50,000 but at least 25,000 shall have no more than 31 supervisors.

4. Counties with a population of less than 25,000 and containing more than one town shall have no more than 21 supervisors.

5. If the population of any county is within 2% of the minimum population for the next most populous grouping under this paragraph, the board thereof, in establishing supervisory districts, may employ the maximum number for such districts set for such next most populous grouping.

(b) *Creation of supervisory districts.* 1. Within 60 days after the population count by block established in the decennial federal census of population, and maps showing the location and numbering of census blocks

become available in printed form from the federal government or are published for distribution by an agency of this state, but no later than July 1 following the year of each decennial census, each board shall propose a tentative county supervisory district plan setting forth the number of supervisory districts and tentative boundaries or a description of boundary requirements, hold a public hearing on the proposed plan and adopt a tentative plan. The proposed plan may be amended after the public hearing. The board shall solicit suggestions from municipalities concerning the development of an appropriate plan. The board shall transmit to each municipal governing body in the county the tentative plan that is adopted. Each district shall consist of whole wards or municipalities. Each district shall be designated to be represented by one supervisor, and all districts shall be substantially equal in population. In the tentative plan, the board shall, whenever possible, place whole contiguous municipalities or contiguous parts of the same municipality within the same district. If the division of a municipality is sought by the board, the board shall provide with the plan a written statement to the municipality affected by each proposed division specifying the approximate location of the territory from which a ward is sought to be created for contiguity purposes and the approximate population of the ward proposed to effectuate the division.

2. Within 60 days after every municipality in the county adjusts its wards under s. 5.15, the board shall hold a public hearing and shall then adopt a final supervisory district plan, numbering each district. Wards within each supervisory district created by the plan shall be contiguous, except that one or more wards located within a city or village which is wholly surrounded by another city

or water, or both, may be combined with one or more noncontiguous wards, or one or more wards or portions of wards consisting of island territory as defined ins. 5.15 (2) (f) 3. may be combined with one or more noncontiguous wards or portions of wards within the same municipality, to form a supervisory district.

3. In this paragraph, a district which includes territory connected to other territory from corner to corner is contiguous.

4. The chairperson of the board shall file a certified copy of the final districting plan with the secretary of state.

(c) *Changes during decade.* After the enactment of a plan of supervisory districts under par. (b), a municipal incorporation, annexation, detachment or consolidation may serve as a basis for altering between federal decennial censuses the boundaries of supervisory districts, in the discretion of the board. The number of supervisory districts in the county shall not be changed by any action under this paragraph. Any plan of county supervisory districts enacted under par. (b) may be amended under this paragraph but shall remain in effect as amended until superseded by another plan enacted by the board under par. (b) and filed with the secretary of state.

(d) *Election and term of supervisors.* Supervisors are county officers, shall be elected for 2-year terms at the election to be held on the first Tuesday in April in even-numbered years and shall take office on the 3rd Tuesday in April of that year.

(e) *Vacancies.* If a vacancy occurs on the board, the board chairperson with the approval of the board shall

appoint a person who is a qualified elector and resident of the supervisory district to fill the vacancy for the unexpired portion of the term to which the person is appointed and until his or her successor is elected and qualified.

(f) *Compensation.* Each supervisor shall be paid a per diem by the county for each day that he or she attends a meeting of the board. Any board may, at its annual meeting, by a two-thirds vote of all the members, fix the compensation of the board members to be next elected. Any board may also provide additional compensation for the chairperson.

(g) *Mileage.* Each supervisor shall, for each day that he or she attends a meeting of the board, receive mileage for each mile traveled in going to and returning from the meetings by the most usual traveled route at the rate established by the board under s. 59.22 as the standard mileage allowance for all county employees and officers.

(h) *Limitation on compensation.* Except for services as a member of a committee as provided in s. 59.13 no supervisor shall be paid for more days' attendance on the board in any year than is set out in this schedule: in counties having a population of less than 25,000, 20 days; at least 25,000 but less than 100,000, 25 days; at least 100,000 but less than 500,000, 30 days.

(i) *Alternative compensation.* As an alternative method of compensation, in counties having a population of less than 500,000, including counties containing only one town, the board may at its annual meeting, by a two-thirds vote of the members entitled to a seat, fix the compensation of the supervisors to be next elected at an annual salary for all services for the county including all committee services, except the per diem allowance for

services in acquiring highway rights-of-way set forth in s. 84.09 (4). The board may, in like manner, allow additional salary for the members of the highway committee and for the chairperson of the board. In addition to the salary, the supervisors shall receive mileage as provided in par. (g) for each day's attendance at board meetings or for attendance at not to exceed 2 committee meetings in any one day.

(j) *Supplementary compensation.* The board, in establishing an annual salary, may enact an ordinance providing for a per diem for all committee meetings attended in excess of 40 committee and board meetings.

(4) COMPATIBILITY. No county officer or employee is eligible for election or appointment to the office of supervisor, but a supervisor may also be a member of a committee, board or commission appointed by the county executive or county administrator or appointed or created by the county board, a town board, a mosquito control district, the common council of his or her city, the board of trustees of his or her village or the board of trustees of a county institution appointed under s. 46.18.

(5) COUNTIES HAVING ONLY ONE TOWN. In all counties containing one town only, the board shall consist of the members of the town board and one supervisor from every village. A supervisor from a village shall be elected at the time the other village officers are elected. A majority of the members shall constitute a quorum of the county board. Each supervisor shall receive compensation and mileage as provided in sub. (3) (f) and (g). The chairperson of the board elected under s. 59.12 (1) may be, but need not be, the same person who is elected chairperson of the town board under s. 60.21 (3) (a).

(6) ENFORCEMENT OF DIVISION REQUIREMENT. If a county fails to comply with sub. (2) (a) or (3) (b), any municipality located in whole or in part within the county or any elector of the county may submit to the circuit court for the county within 14 days from the expiration of either 60-day period under sub. (2) (a) or (3) (b) a proposed tentative or final plan for creation of supervisory districts in compliance with this section. If the court finds that the existing division of the county into supervisory districts fails to comply with this section, it shall review the plan submitted by the petitioner and after reasonable notice to the county may promulgate the plan, or any other plan in compliance with this section, as a temporary supervisory district plan until superseded by a districting plan adopted by the board in compliance with this section.